IN Purſuance of an Order of the HOUSE of PEERS, of the Twenty-ſecond Day of *April* 1776, I do appoint CHARLES BATHURST to Print and Publiſh the Trial of *Elizabeth* Ducheſs Dowager of *Kingſton* for Bigamy: And do forbid any other Perſon to Print or Publiſh the ſame.

Bathurſt, C.

THE

TRIAL

OF

Elizabeth Ducheſs Dowager of *Kingſton*

FOR

BIGAMY,

Before the RIGHT HONOURABLE

The HOUSE of PEERS,

IN

WESTMINSTER-HALL, in Full PARLIAMENT,

On MONDAY the 15th, TUESDAY the 16th, FRIDAY the 19th, SATURDAY the 20th, and MONDAY the 22d of *April*, 1776; on the laſt of which Days the ſaid *Elizabeth* Ducheſs Dowager of *Kingſton* was found Guilty.

Publiſhed by Order of the HOUSE of PEERS.

LONDON:

Printed for CHARLES BATHURST, in *Fleet-Street*.

M.DCC.LXXVI.

THE

TRIAL

OF

Elizabeth Ducheſs Dowager of *Kingſton*

FOR

BIGAMY,

Before the RIGHT HONOURABLE

The HOUSE of PEERS,

IN

WESTMINSTER-HALL, in Full PARLIAMENT.

Monday, April the 15th, 1776.

In the Court erected in WESTMINSTER-HALL, for the Trial of *ELIZABETH* Ducheſs Dowager of *KINGSTON* for BIGAMY.

ABOUT Ten of the Clock the Lords came from their own Houſe into the Court erected in *Weſtminſter-Hall*, for the Trial of *Elizabeth* Ducheſs Dowager of *Kingſton*, in the Manner following:

The Lord High Steward's Gentlemen Attendants, Two and Two.

The Clerks Aſſiſtant to the Houſe of Lords, and the Clerk of the Parliament.

Clerk of the Crown in Chancery, bearing the King's Commiſſion to the Lord High Steward, and the Clerk of the Crown in the King's Bench.

The Maſters in Chancery, Two and Two.

The Judges, Two and Two.

The Peers eldeſt Sons, Two and Two.

Peers Minors, Two and Two.

Cheſter and *Somerſet* Heralds.

Four Serjeants at Arms with their Maces, Two and Two.

The Yeoman Uſher of the Houſe.
The Barons, Two and Two, beginning with the youngeſt Baron.
The Biſhops, Two and Two.
The Viſcounts and other Peers, Two and Two.
The Lord Privy Seal and Lord Preſident.
The Archbiſhop of *York* and the Archbiſhop of *Canterbury*.
Four Serjeants at Arms with their Maces, Two and Two.
The Serjeant at Arms attending the Great Seal, and Purſe-Bearer.
Then *Garter* King at Arms, and the Gentleman Uſher of the Black Rod carrying the White Staff before the Lord High Steward.
Henry Earl *Bathurſt*, Chancellor of *Great Britain*, Lord High Steward, alone, his Train borne.
His Royal Highneſs the Duke of *Cumberland*, his Train borne.
The Lords being placed in their proper Seats, and the Lord High Steward upon the Woolpack, the Houſe was reſumed.
The Clerk of the Crown in Chancery, having his Majeſty's Commiſſion to the Lord High Steward in his Hand, and the Clerk of the Crown in the King's Bench, ſtanding before the Clerk's Table with their Faces towards the State, made Three Reverences; the Firſt at the Table, the Second in the Midway, and the Third near the Woolpack; then kneeled down; and the Clerk of the Crown in Chancery, on his Knee, preſented the Commiſſion to the Lord High Steward, who delivered the ſame to the Clerk of the Crown in the King's Bench to read: Then riſing, they made Three Reverences, and returned to the Table. And then Proclamation was made for Silence, in this Manner:
Serjeant at Arms. Oyez, Oyez, Oyez! Our Sovereign Lord the King ſtrictly charges and commands all Manner of Perſons to keep Silence, upon Pain of Impriſonment.
Then the Lord High Steward ſtood up, and ſpoke to the Peers.
Lord High Steward. His Majeſty's Commiſſion is about to be read: Your Lordſhips are deſired to attend to it in the uſual Manner; and all others are likewiſe to ſtand up uncovered while the Commiſſion is reading.

All the Peers uncovered themſelves; and they, and all others, ſtood up uncovered, while the Commiſſion was read.

GEORGE R.

GEORGE the Third, by the Grace of God, of *Great Britain*, *France*, and *Ireland* King, Defender of the Faith, and ſo forth. To our Right Truſty and Right Well-beloved Couſin and Counſellor *Henry* Earl *Bathurſt*, our Chancellor of *Great Britain*, greeting. Know ye, That whereas *Elizabeth* the Wife of *Auguſtus John Hervey*, late of the Pariſh of *Saint George*, *Hanover Square*, in our County of *Middleſex*, Eſquire, before Our Juſtices of Oyer and Terminer, at *Hicks' Hall*, in *Saint John-ſtreet*, in and for Our County of *Middleſex*, upon the Oath of Twelve Jurors, good and lawful Men of the ſaid County of *Middleſex*, then and there ſworn and charged to enquire for Us for the Body of the ſaid County, ſtands indicted of Polygamy and feloniouſly marrying *Evelyn Pierrepont* late Duke of *Kingſton*, ſhe being then married, and the Wife of the ſaid *Auguſtus John Hervey*: We, conſidering that Juſtice is an excellent Virtue, and pleaſing to the Moſt High, and being willing that the ſaid *Elizabeth*, of and for the Felony whereof ſhe is indicted as aforeſaid, before Us, in Our preſent Parliament, according to the Law and Cuſtom of Our Kingdom of *Great Britain*, may be heard, examined, ſentenced, and adjudged; and that all other Things which are neceſſary in this Behalf may be duly exerciſed and executed; and for that the Office of High Steward of *Great Britain* (whoſe Preſence in this Behalf is required) is now vacant (as We are informed) We, very much confiding in your Fidelity, Prudence, provident Circumſpection, and Induſtry, have for this Cauſe ordained and conſtituted you Steward of *Great Britain*, to hear, execute, and exerciſe for this Time the ſaid Office, with all Things due and belonging to the ſame Office in this Behalf: And therefore We command you, that you diligently ſet about the Premiſes, and for this Time do exerciſe and execute with Effect all thoſe Things which belong to the Office of Steward of *Great Britain*, and which are required in this Behalf. In Witneſs whereof We have cauſed theſe Our Letters to be made Patent. Witneſs Ourſelf at *Weſtminſter* the Fifteenth Day of *April*, in the Sixteenth Year of Our Reign.

By the KING Himſelf, ſigned with his own Hand.

YORKE.

Serjeant

Serjeant at Arms. God ſave the King!

Then *Garter*, and the Gentleman Uſher of the Black Rod, after Three Reverences, kneeling, jointly preſented the White Staff to his Grace the Lord High Steward: And then his Grace, attended by *Garter*, Black Rod, and the Purſe-Bearer (making his proper Reverences towards the Throne) removed from the Woolpack to an armed Chair, which was placed on the uppermoſt Step but one of the Throne, as it was prepared for that Purpoſe; and then ſeated himſelf in the Chair, and delivered the Staff to the Gentleman Uſher of the Black Rod on his Right Hand, the Purſe-Bearer holding the Purſe on his Left.

Clerk of the Crown. Serjeant at Arms, make Proclamation.

Serjeant at Arms. Oyez, Oyez, Oyez! Our Sovereign Lord the King ſtrictly charges and commands all Manner of Perſons to keep Silence, upon Pain of Impriſonment.

Then the Clerk of the Crown, by Direction of the Lord High Steward, read the *Certiorari*, and the Return thereof, together with the Caption of the Indictment, and the Indictment certified thereupon, againſt *Elizabeth* Ducheſs Dowager of *Kingſton*; *in hæc verba:*

GEORGE the Third, by the Grace of God, of *Great Britain*, *France*, and *Ireland* King, Defender of the Faith, and ſo forth. To Our Juſtices of Oyer and Terminer at *Hicks' Hall*, in *Saint John-ſtreet*, in and for Our County of *Middleſex*, and to every of them, greeting. We being willing, for certain Reaſons Us thereunto moving, that all and ſingular Indictments of whatſoever Felonies whereof *Elizabeth* calling herſelf Ducheſs Dowager of *Kingſton*, by the Name of *Elizabeth* the Wife of *Auguſtus John Hervey*, late of the Pariſh of *Saint George*, *Hanover Square*, in the County of *Middleſex*, Eſquire, is indicted before you (as is ſaid) be determined before Us in Our Parliament, and not elſewhere; do command you and every of you, that you or One of you do ſend under your Seals, or under the Seal of One of you, before Us in Our preſent Parliament, immediately after the Receipt of this Our Writ, all and ſingular the Indictments aforeſaid, with all Things touching the ſame, by whatſoever Name the ſaid *Elizabeth* is called in the ſame, together with this Writ, that We may cauſe further to be done thereon, what of Right and according to the Law and Cuſtom of *England* We ſhall ſee fit to be done. Witneſs Ourſelf at *Weſtminſter* the Eleventh Day of *November*, in the Sixteenth Year of our Reign.

YORKE.

To the Juſtices of Oyer and Terminer, at *Hicks' Hall*, in *Saint John-ſtreet*, in and for the County of *Middleſex*, and to every of them, a Writ of *Certiorari* to certify into the Upper Houſe of Parliament the Indictment found againſt *Elizabeth* calling herſelf Ducheſs Dowager of *Kingſton*, by the Name of *Elizabeth* Wife of *Auguſtus John Hervey*, for Bigamy, returnable immediately before the King in Parliament.

YORKE.

By Order of the Lords Spiritual and Temporal in Parliament aſſembled.

The Execution of this Writ appears by the Schedules and Indictment to this Writ annexed.

The Anſwer of Sir *John Hawkins*, Knight, One of the Juſtices within written.

Middleſex. } BE it Remembered, That at the General Seſſion of Oyer and Terminer of Our Lord the King, holden for the County of *Middleſex* at *Hicks' Hall*, in *Saint John-ſtreet*, in the ſaid County, on *Monday* the Ninth Day of *January*, in the Fifteenth Year of the Reign of Our Sovereign Lord *George* the Third, King of *Great Britain*, and ſo forth, before Sir *John Hawkins*, Knight, *John Cox*, *David Wilmot*, *John Brettell*, Eſquires, and Others their Fellows Juſtices of Our ſaid Lord the King, aſſigned by His Majeſty's Letters Patent under the Great Seal of *Great Britain* directed to ſame Juſtices before named, and others in the ſaid Letters named, to inquire more fully the Truth by the Oath of good and lawful Men of the ſaid County of *Middleſex*, and by other Ways, Means, and Methods by which they ſhall or may better know (as well within Liberties as without) by whom the Truth of the Matter may be better known, of all Treaſons, Miſpriſions of Treaſon, Inſurrections, Rebellions, Counterfeitings, Clippings, Waſhings, falſe Coinings, and other Falſities of the Money of *Great Britain* and other Kingdoms and

Dominions

Dominions whatſoever, and of all Murthers, Felonies, Manſlaughters, Killings, Burglaries, Rapes of Women, unlawful Meetings, Conventicles, unlawful Uttering of Words, Aſſemblies, Miſpriſions, Confederacies, falſe Allegations, Treſpaſſes, Riots, Routs, Retentions, Eſcapes, Contempts, Falſities, Negligences, Concealments, Maintenances, Oppreſſions, Champarties, Deceipts, and all other evil Doings, Offences, and Injuries whatſoever, and alſo the Acceſſaries of them, within the County aforeſaid (as well within Liberties as without) by whomſoever and in what Manner ſoever done, committed, or perpetrated, and by whom or to whom, when, how, and after what Manner, and of all other Articles and Circumſtances concerning the Premiſes, and every of them, or any of them, in any Manner whatſoever, and the ſaid Treaſons and other the Premiſes to hear and determine according to the Laws and Cuſtoms of *England*, by the Oath of *John Tilney*, *James Stafford*, *Richard Phillips*, *Samuel Stable*, *Samuel Bird*, *William Hilliar*, *Paul Barbot*, *William Weatherill*, *Thomas Waddell*, *John Williams*, *Samuel Baker*, *Thomas Sheriff*, *John Leiceſter*, *Thomas Tanton*, *John Goodere*, *John Thomas*, and *Robert Davis*, Gentlemen, good and lawful Men of the County aforeſaid, now here ſworn and charged to enquire for Our ſaid Lord the King for the Body of the ſame County; it is preſented in Manner and Form as appears by the Indictment and Schedules hereunto annexed.

BUTLER.

GEORGE the Third, by the Grace of God, of *Great Britain*, *France*, and *Ireland* King, Defender of the Faith, and ſo forth. To Our Juſtices of Oyer and Terminer, at *Hicks' Hall*, in *Saint John-ſtreet*, in and for Our County of *Middleſex*, and to every of them, greeting. Whereas by Our Writ We have lately commanded you, and every of you, for certain Reaſons, you or One of you ſhould ſend under your Seals, or the Seal of One of you, before Us at *Weſtminſter*, immediately after the Receipt of that Writ, all and ſingular Indictments of whatſoever Treſpaſſes, Contempts, and Felonies whereof *Elizabeth* the Wife of *Auguſtus John Hervey*, Eſquire, was indicted before you (as was ſaid) with all Things touching the ſame, by whatſoever Name the ſaid *Elizabeth* ſhould be called therein, together with the ſaid Writ to you directed, that We might further cauſe to be done thereon what of Right and according to the Law and Cuſtom of *England* We ſhould ſee fit to be done: And We do, for certain Reaſons Us thereunto moving, command you and every of you, that you or One of you do wholly ſuperſede whatſoever is to be done concerning the Execution of that Our ſaid Writ; and that you proceed to the Determination of the Treſpaſſes, Contempts, and Felonies aforeſaid with that Expedition which to you ſhall ſeem right and according to the Law and Cuſtom of *England*, notwithſtanding Our Writ as before ſent to you directed for that Purpoſe. Witneſs *William* Lord *Mansfield* at *Weſtminſter*, the Twenty-third Day of *May*, in the Fifteenth Year of Our Reign.

Received 13th *June* 1775. *C. E.* By the Court. *BURROW.*
By Rule of Court.

GEORGE the Third, by the Grace of God, of *Great Britain*, *France*, and *Ireland* King, Defender of the Faith. To Our Juſtices of Oyer and Terminer, at *Hicks' Hall*, in *Saint John-ſtreet*, in and for Our County of *Middleſex*, and to every of them, greeting. We being willing, for certain Reaſons, that all and ſingular Indictments of whatſoever Treſpaſſes, Contempts, and Felonies whereof *Elizabeth* the Wife of *Auguſtus John Hervey*, Eſquire, is indicted before you (as is ſaid) be determined before Us, and not elſewhere, Do command you and every of you, that you or One of you do ſend under your Seals, or the Seal of One of you, before Us at *Weſtminſter*, immediately after the Receipt of this Our Writ, all and ſingular the ſaid Indictments, with all Things touching the ſame, by whatſoever Name the ſaid *Elizabeth* may be called in the ſame, together with this Our Writ, that We may further cauſe to be done thereon what of Right and according to the Law and Cuſtom of *England* We ſhall ſee fit to be done. Witneſs *William* Lord *Mansfield* at *Weſtminſter*, the Eighteenth Day of *May*, in the Fifteenth Year of Our Reign.

By the Court. *BURROW.*

At the Inſtance of the within-named Defendant, by Rule of Court.

The Execution of this Writ appears by the Schedules and Indictment to this Writ annexed.

The Anſwer of Sir *John Hawkins*, Knight, One of the Juſtices within-written.

Middleſex. } BE it Remembered, That at the General Seſſion of Oyer and Terminer of Our Lord the King, holden for the County of *Middleſex* at *Hicks' Hall*, in *Saint John-ſtreet*, in the ſaid County, on *Monday* the Ninth Day of *January*, in the Fifteenth Year of the Reign of our Sovereign Lord *George* the Third, King of *Great Britain*, and ſo forth, before Sir *John Hawkins*, Knight, Sir *James Eſdaile*, Knight, *David Wilmot*, *John Mackin*, Eſquires, and others their Fellows Juſtices of Our ſaid Lord the King, aſſigned by his Majeſty's Letters Patent under the Great Seal of *Great Britain* directed to the ſame Juſtices before-named, and others in the ſaid Letters named, to inquire more fully the Truth, by the Oath of good and lawful Men of the County of *Middleſex* aforeſaid, and by other Ways, Means, and Methods by which they ſhall or may better know (as well within Liberties as without) by whom the Truth of the Matter may be better known, of all Treaſons, Miſpriſions of Treaſon, Inſurrections, Rebellions, Counterfeitings, Clippings, Waſhings, falſe Coinings, and other Falſities of the Money of *Great Britain* and other Kingdoms and Dominions whatſoever, and of all Murthers, Felonies, Manſlaughters, Killings, Burglaries, Rapes of Women, unlawful Meetings, Conventicles, unlawful Uttering of Words, Aſſemblies, Miſpriſions, Confederacies, falſe Allegations, Treſpaſſes, Riots, Routs, Retentions, Eſcapes, Contempts, Falſities, Negligencies, Concealments, Maintenances, Oppreſſions, Champarties, Deceipts, and all other evil Doings, Offences, and Injuries whatſoever, and alſo the Acceſſaries of them, within the County aforeſaid (as well within Liberties as without) by whomſoever and in what Manner ſoever done, committed, or perpetrated, and by whom or to whom, when, how, and after what Manner, and of all other Articles and Circumſtances concerning the Premiſes and every of them or any of them, in any Manner whatſoever; and the ſaid Treaſons and other the Premiſes to hear and determine according to the Laws and Cuſtoms of *England*, by the Oath of *John Tilney*, *James Stafford*, *Richard Phillips*, *Samuel Stable*, *Samuel Bird*, *William Hilliar*, *Paul Barbot*, *William Weatherill*, *Thomas Waddell*, *John Williams*, *Samuel Baker*, *Thomas Sheriff*, *John Leiceſter*, *Thomas Tanton*, *John Goodere*, *John Thomas*, and *Robert Davis*, Gentlemen, good and lawful Men of the County aforeſaid, now here ſworn and charged to inquire for Our ſaid Lord the King for the Body of the ſame County: It is preſented in Manner and Form as appears by a certain Bill of Indictment to this Schedule annexed.

BUTLER.

GEORGE the Third, by the Grace of God, of *Great Britain*, *France*, and *Ireland* King, Defender of the Faith, and ſo forth. To the Sheriff of our County of *Middleſex*, greeting: We command you, that you omit not, by reaſon of any Liberty in your Bailiwick, but that you take *Elizabeth* the Wife of *Auguſtus John Hervey*, late of the Pariſh of *Saint George*, *Hanover Square*, in the County of *Middleſex*, Eſquire, if ſhe ſhall be found in your Bailiwick, and her ſafely keep, ſo that you may have her Body before Our Juſtices aſſigned by Our Letters Patent under our Great Seal of *Great Britain*, to inquire more fully the Truth, by the Oath of good and lawful Men of our County of *Middleſex* aforeſaid, and by other Ways, Means, and Methods by which they ſhall or may better know (as well within Liberties as without) by whom the Truth of the Matter may be better known, of all Treaſons, Miſpriſions of Treaſon, Inſurrections, Rebellions, Counterfeitings, Clippings, Waſhings, falſe Coinings, and other Falſities of the Money of *Great Britain* and other Kingdoms and Dominions whatſoever, and of all Murthers, Felonies, Manſlaughters, Killings, Burglaries, Rapes of Women, unlawful Meetings, Conventicles, unlawful Uttering of Words, Aſſemblies, Miſpriſions, Confederacies, falſe Allegations, Treſpaſſes, Riots, Routs, Retentions, Eſcapes, Contempts, Falſities, Negligencies, Concealments, Maintenances, Oppreſſions, Champarties, Deceipts, and all other evil Doings, Offences, and Injuries whatſoever, and alſo the Acceſſaries of them, within the County aforeſaid (as well within Liberties as without) by whomſoever and in what Manner ſoever done, committed, or perpetrated, and by whom or to whom, when, how, and after what Manner, and of all other Articles and Circumſtances concerning the Premiſes and every of them or any of them, in any Manner whatſoever; and the ſaid Treaſons and other the Premiſes to hear and determine according to the Laws and Cuſtoms of *England*, at the next General Seſſion of Oyer and Terminer to be holden for Our ſaid County, to anſwer Us concerning certain Felonies whereof ſhe is indicted before our ſaid Juſtices; and have you then there

this

this Writ. Witneſs Sir *John Hawkins*, Knight, at *Hicks' Hall*, the Ninth Day of *January*, in the Fifteenth Year of Our Reign.

BUTLER.

The within-named *Elizabeth* the Wife of *Auguſtus John Hervey* is not found in my Bailiwick.

The Anſwer of

WILLIAM PLOMER, Eſquire, and *JOHN HART*, Eſquire, } Sheriff.

GEORGE the Third, by the Grace of God, of *Great Britain*, *France*, and *Ireland* King, Defender of the Faith, and ſo forth. To the Sheriff of Our County of *Middleſex*, greeting: We command you, as before We have commanded you, that you omit not, by reaſon of any Liberty in your Baliwick, but that you take *Elizabeth* the Wife of *Auguſtus John Hervey*, late of the Pariſh of *Saint George*, *Hanover Square*, in the County of *Middleſex*, Eſquire, if ſhe ſhall be found in your Bailiwick, and her ſafely keep, ſo that you have her Body before Our Juſtices aſſigned by Our Letters Patent under Our Great Seal of *Great Britain*, to inquire more fully the Truth, by the Oath of good and lawful Men of Our County of *Middleſex* aforeſaid, and by other Ways, Means, and Methods by which they ſhall or may better know (as well within Liberties as without) by whom the Truth of the Matter may be better known, of all Treaſons, Miſpriſions of Treaſon, Inſurrections, Rebellions, Counterfeitings, Clippings, Waſhings, falſe Coinings, and other Falſities of the Money of *Great Britain*, and other Kingdoms and Dominions whatſoever, and of all Murthers, Felonies, Manſlaughters, Killings, Burglaries, Rapes of Women, unlawful Meetings, Conventicles, unlawful Uttering of Words, Aſſemblies, Miſpriſions, Confederacies, falſe Allegations, Treſpaſſes, Riots, Routs, Retentions, Eſcapes, Contempts, Falſities, Negligencies, Concealments, Maintenances, Oppreſſions, Champarties, Deceipts, and all other evil Doings, Offences, and Injuries whatſoever, and alſo the Acceſſaries of them, within the County aforeſaid (as well within Liberties as without) by whomſoever and in what Manner ſoever done, committed, or perpetrated, and by whom, or to whom, when, how, and after what Manner, and of all other Articles and Circumſtances concerning the Premiſes, and every of them, or any of them, in any Manner whatſoever; and the ſaid Treaſons and other the Premiſes to hear and determine, according to the Laws and Cuſtoms of *England*, at the next General Seſſion of Oyer and Terminer to be holden for Our ſaid County, to anſwer Us concerning certain Felonies whereof ſhe is indicted before Our ſaid Juſtices; and have you then there this Writ. Witneſs Sir *John Hawkins*, Knight, at *Hicks' Hall*, the Fourteenth Day of *February*, in the Fifteenth Year of Our Reign.

BUTLER.

The within-named *Elizabeth* the Wife of *Auguſtus John Hervey*, Eſquire, is not found in my Bailwick.

The Anſwer of

WILLIAM PLOMER, Eſquire, and *JOHN HART*, Eſquire, } Sheriff.

Middleſex. } THE Jurors for Our Sovereign Lord the now King, upon their Oath preſent, that *Elizabeth* the Wife of *Auguſtus John Hervey*, late of the Pariſh of *Saint George*, *Hanover Square*, in the County of *Middleſex*, Eſquire, on the Eighth Day of *March*, in the Ninth Year of the Reign of Our Sovereign Lord *George* the Third, now King of *Great Britain*, and ſo forth, being then married, and then the Wife of the ſaid *Auguſtus John Hervey*, with Force and Arms at the ſaid Pariſh of *Saint George*, *Hanover Square*, in the ſaid County of *Middleſex*, felonioufly did marry and take to Huſband *Evelyn Pierrepont* Duke of *Kingſton* (the ſaid *Auguſtus John Hervey*, her former Huſband, being then alive) againſt the Form of the Statute in ſuch Caſe made and provided, and againſt the Peace of Our ſaid Lord the King, his Crown and Dignity: And the ſaid Jurors for Our ſaid

ſaid Sovereign Lord the now King, upon their Oath aforeſaid further preſent, that the ſaid *Elizabeth*, heretofore (to wit) on the Fourth Day of *Auguſt*, in the Eighteenth Year of the Reign of Our late Sovereign Lord *George* the Second, late King of *Great Britain*, and ſo forth, at the Pariſh of *Lainſton*, in the County of *Southampton*, by the Name of *Elizabeth Chudleigh*, did marry the ſaid *Auguſtus John Hervey*, and him the ſaid *Auguſtus John Hervey* then and there had for her Huſband; and that the ſaid *Elizabeth* being married, and the Wife of the ſaid *Auguſtus John Hervey*, afterwards (to wit) on the Eighth Day of *March*, in the Ninth Year of the Reign of Our ſaid Sovereign Lord *George* the Third, now King of *Great Britain*, and ſo forth, with Force and Arms, at the ſaid Pariſh of *Saint George, Hanover Square*, in the ſaid County of *Middleſex*, feloniouſly did marry and take to Huſband the ſaid *Evelyn Pierrepont* Duke of *Kingſton* (the ſaid *Auguſtus John Hervey*, her former Huſband, being then alive) againſt the Form of the Statute in ſuch Caſe made and provided, and againſt the Peace of Our ſaid Sovereign Lord the now King, his Crown and Dignity.

O. T.

True Bill.

Auguſtine Greenland,
Ann Cradock,
Chriſtopher Dixon,
Thomas Dodd,
Samuel Harper,
John Fozard.

Sworn in Court.

Lord High Steward. Is it your Lordſhips Pleaſure, that the Judges have Leave to be covered?

Lords. Ay, ay.

Clerk of the Crown. Serjeant at Arms, make Proclamation for the Gentleman Uſher of the Black Rod to bring his Priſoner to the Bar.

Serjeant at Arms. Oyez, Oyez, Oyez! *Elizabeth* Ducheſs Dowager of *Kingſton*, come forth and ſave you and your Bail, or elſe you forfeit your Recognizance.

[*After her Surrender ſhe was, during the Trial, called to the Bar by the following Proclamation.*]

Gentleman Uſher of the Black Rod, bring your Priſoner *Elizabeth* Ducheſs Dowager of *Kingſton* to the Bar, purſuant to the Order of the Houſe of Lords.

Then *Elizabeth* Ducheſs Dowager of *Kingſton* was brought to the Bar by the Deputy Gentleman Uſher of the Black Rod. The Priſoner, when ſhe approached the Bar, made Three Reverences, and then fell upon her Knees at the Bar.

Lord High Steward. Madam, you may riſe.

The Priſoner then roſe up, and curteſied to his Grace the Lord High Steward, and to the Houſe of Peers; which Compliment was returned her by his Grace, and the Lords.

Then, Proclamation having been made again for Silence, the Lord High Steward ſpake to the Priſoner, as follows.

Lord High Steward.

Madam,

YOU ſtand indicted for having married a Second Huſband, your Firſt Huſband being living.

A Crime ſo deſtructive of the Peace and Happineſs of private Families, and ſo injurious in its Conſequences to the Welfare and good Order of Society, that by the Statute Law of this Kingdom it was for many Years (in your Sex) puniſhable with Death; the Lenity, however, of later Times has ſubſtituted a milder Puniſhment in its Stead.

This Conſideration muſt neceſſarily tend to leſſen the Perturbation of your Spirits upon this awful Occaſion.

But that, Madam! which, next to the inward Feelings of your own Conſcience, will afford you moſt Comfort is, reflecting upon the Honour, the Wiſdom, and the Candour of this High Court of criminal Juriſdiction.

It is, Madam, by your particular Deſire that you now ſtand at that Bar: You were not brought there by any Proſecutor.

In your Petition to the Lords, praying for a ſpeedy Trial, you aſſumed the Title of Ducheſs Dowager of *Kingſton*, and it was by that Title that the Court of King's Bench admitted you to Bail; in your Petition you likewiſe averred, that *Auguſtus John Hervey*, whoſe Wife the Indictment charges you with being, is at this Time Earl of *Briſtol*: Upon examining

examining their Records the Lords were ſatisfied of the Truth of that Averrment; and have accordingly allowed you the Privilege you petitioned for, of being tried by your Peers in full Parliament; and from them you will be ſure to meet with nothing but Juſtice tempered with Humanity.

Before I conclude, I am commanded by the Houſe to acquaint you, Madam, and all other Perſons having Occaſion to ſpeak to the Court during the Trial, that they are to addreſs themſelves to the Lords in general, and not to any Lord in particular.

Ducheſs of Kingſton. My Lords, I, the unfortunate Widow of Your late Brother, the Moſt Noble *Evelyn Pierrepont* Duke of *Kingſton*, am brought to the Bar of this Right Honourable Houſe without a Shadow of Fear, but infinitely awed by the Reſpect that is due to You, my moſt Honourable Judges.

My Lords, After having, at the Hazard of my Life, returned from *Rome* in a dangerous Sickneſs to ſubmit myſelf to the Laws of my Country, I plead ſome little Merit in my willing Obedience; and I intreat Your Lordſhips Indulgence, if I ſhould be deficient in any ceremonial Part of my Conduct towards You, my moſt Honoured and Reſpectable Judges: For the Infirmities of my Body and the Oppreſſion of Spirits, under which I labour, leave your unhappy Priſoner ſometimes without Recollection; but it muſt be only with the Loſs of Life, that I can be deprived of the Knowledge of the Reſpect that is due to this high and awful Tribunal.

Lord High Steward. Madam, your Ladyſhip will do well to give Attention, while you are arraigned on your Indictment.

Then Proclamation was made for Silence.

After which *Elizabeth* Ducheſs Dowager of *Kingſton* was arraigned, in the Form of the ſaid Indictment againſt her, by the Clerk of the Crown in the King's Bench.

ELIZABETH Ducheſs Dowager of *Kingſton*, you ſtand indicted by the Name of *Elizabeth* the Wife of *Auguſtus John Hervey*, late of the Pariſh of *Saint George, Hanover Square*, Eſquire (now become a Peer of this Realm) for that you, on the Eighth Day of *March*, in the Ninth Year of the Reign of his preſent Majeſty Our Sovereign Lord King *George* the Third, being then married, and then the Wife of the ſaid *Auguſtus John Hervey*, with Force and Arms, at the ſaid Pariſh of *Saint George, Hanover Square*, in the ſaid County of *Middleſex*, feloniouſly did marry and take to Huſband *Evelyn Pierrepoint* Duke of *Kingſton*, the ſaid *Auguſtus John Hervey*, your former Huſband, being then alive; againſt the Form the Statute in ſuch Caſe made and provided, and againſt the Peace of Our ſaid Lord the King, his Crown and Dignity.

The Indictment further charges, That you the ſaid *Elizabeth*, heretofore (to wit) on the Fourth Day of *Auguſt*, in the Eighteenth Year of Our late Sovereign Lord *George* the Second, late King of *Great Britain*, and ſo forth, at the Pariſh of *Lainſton*, in the County of *Southampton*, by the Name of *Elizabeth Chudleigh*, did marry the ſaid *Auguſtus John Hervey*, and him the ſaid *Auguſtus John Hervey* then and there had for your Huſband; and that you the ſaid *Elizabeth*, being married, and the Wife of the ſaid *Auguſtus John Hervey*, afterwards (to wit) on the Eighth Day of *March*, in the Ninth Year of the Reign of Our ſaid Sovereign Lord *George* the Third, now King of *Great Britain*, and ſo forth, with Force and Arms, at the ſaid Pariſh of *Saint George, Hanover Square*, feloniouſly did marry and take to Huſband the ſaid *Evelyn Pierrepoint* Duke of *Kingſton*, the ſaid *Auguſtus John Hervey*, your former Huſband being then alive.

How ſay you? Are you guilty of the Felony whereof you ſtand indicted, or not guilty?

Ducheſs of Kingſton. I *Elizabeth Pierrepont*, Ducheſs Dowager of *Kingſton*, indicted by the Name of *Elizabeth*, the Wife of *Auguſtus John Hervey*, Eſquire, ſay, that I am not guilty.

Clerk of the Crown. Cul': prît——How will you be tried?

Ducheſs of Kingſton. By God and my Peers.

Clerk of the Crown. God ſend your Grace a good Deliverance.

Clerk of the Crown. Serjeant at Arms, make Proclamation.

Serjeant at Arms. Oyez, Oyez, Oyez! All manner of Perſons that will give Evidence, on Behalf of our Sovereign Lord the King, againſt *Elizabeth* Ducheſs Dowager of *Kingſton*, the Priſoner at the Bar, let them come forth, and they ſhall be heard; for now ſhe ſtands at the Bar upon her Deliverance.

Lord

Lord High Steward. My Lords, the Diſtance of this Place from the Bar is ſo great, that I muſt deſire your Lordſhips Leave to go down to the Table for the Convenience of hearing.

Lords. Ay, ay.

Then his Grace removed to the Table.

Ducheſs of Kingſton. My Lords, The ſuppoſed Marriage in the Indictment with Mr. *Hervey*, which is the Ground of the Charge againſt me, was inſiſted upon by him in a Suit inſtituted by me in the Conſiſtory Court of the Right Reverend Lord Biſhop of *London*, by the Sentence of which Court, ſtill in Force, it was pronounced, decreed, and declared, that I was free from all Matrimonial Contracts or Eſpouſals with the ſaid Mr. *Hervey:* And, my Lords, I am adviſed that this Sentence, which I now deſire Leave to offer to your Lordſhips (remaining unreverſed and unimpeached) is concluſive, and that no other Evidence ought to be received or ſtated to your Lordſhips reſpecting ſuch pretended Marriage.

Lord High Steward. Do the Counſel for the Proſecutor object to the Reading of the Sentence?

Mr. Attorney General. My Lords, Obſerving that the Priſoner was about to make ſome Application to your Lordſhips, I was not ſollicitous to riſe in the Order and Place wherein I ought to have addreſſed myſelf to the Houſe; becauſe I would not interrupt, or prevent, any Thing, which ſhe might think material for her to lay before your Lordſhips.

I attended much to the *Form* of the Application. If I comprehend the Aim of it, ſhe means to object to your Lordſhips hearing any Evidence, either given or ſtated, in ſupport of the preſent Indictment; the Ground of her Objection being a Sentence, ſaid to have paſſed in the Eccleſiaſtical Court, againſt the Firſt Marriage ſuppoſed in the Indictment. Upon this, your Lordſhips have demanded, whether I object to the Reading of the Sentence?

If the Proceeding, referred to, had been tendered to your Lordſhips in the only Place, which can be thought the proper or regular one, for receiving the Defendant's Evidence, to be ſure, many Queſtions would naturally have ariſen upon it. Firſt, Whether *that Proceeding*, explained as it will be, has the Force of a Sentence; or amounts to more than a Circumſtance and Proof of the Fraud complained of? Secondly, Whether a *ſerious* Sentence of that Sort, pronounced between Party and Party, ought to be admitted in a *Criminal Proſecution*, and againſt the King, who was no Party to it, nor could have become ſo by any Means? Thirdly, Whether it creates an *Eſtoppel*, or *concluſive Evidence* againſt the Crown? Fourthly, Whether it does ſo in this *peculiar Species of Proſecution?*

But in the Way this Thing is urged, it ſeems perfectly impoſſible, or at leaſt altogether premature, to diſcuſs the Force and Effect of it, as Evidence. *That* ſuppoſes a Caſe already made for the Proſecutor, which requires the Aid of Evidence, on the Part of the Priſoner, to diſprove, or explain it. But, if I catch the Idea perfectly, the preſent Inſiſting is, that the Sentence now offered to the Conſideration of your Lordſhips carries ſome *legal Force*—— what, I do not pretend to define or explain; for I proteſt I have no Gueſs what is meant; but——*ſome legal Force* with it, which enables the Priſoner to demand, in this Stage of the Buſineſs, that the Trial ſhall not proceed, nor any Evidence be heard to maintain the Indictment; but that the whole Matter ſhall be wound up, and conclude with ſome Reſolution of your Lordſhips,—not to acquit (for in order to that you muſt try) but to diſmiſs the Priſoner, without Trial, after putting herſelf upon her Peers for Trial.

I have, notwithſtanding, ſhortly intimated the Nature of the Objections, which may be made to it, as an Article of Evidence for the Priſoner; partly to point out, how untenable the Propoſition is of ſtopping the Trial, by interpoſing a Thing, whoſe Reality, Competence, and Effect will be ſo much diſputed in Matter of Fact and of Law; but chiefly, to lay in my Claim, that this Paper (if your Lordſhips ſhould think it worth hearing) may be read *at this Time*, and for the Purpoſe of the Motion *now* made by the Priſoner *only*, without Prejudice to any Objection, which I may think fit to make to it, if it ſhould be offered as Evidence in the Courſe of the Trial.

If it be read under the Reſerve I have mentioned, not as a Part of the Trial, but to make this Application of the Priſoner to your Lordſhips, previouſly to her Trial, intelligible; and for the Sake of raiſing the Argument upon it, in caſe your Lordſhips ſhould ſuffer ſuch a Point to be argued at all: In theſe Views, I will not object to the Reading of it.

But if it be offered as a Piece of Evidence for the Priſoner, ſo that I muſt admit or object to it *now*, I ſhall certainly inſiſt upon going on with the Proſecution, and drive this Article of Evidence into its own Place, the Priſoner's Defence. There it will be better ſeen, how far it is available, or even competent.

Unleſs I could learn the Purpoſe of offering it from thoſe who adviſed it, I do not know how to make a more particular Anſwer to your Lordſhips Queſtion.

Ducheſs of Kingſton. Will your Lordſhips pleaſe to permit my Counſel to be heard to this Point?

Lords. Ay, ay.

Lord High Steward. Mr. Wallace, you may proceed for the Priſoner.

Mr. Wallace. My Lords, I have the Honour to be aſſigned one of the Counſel to adviſe and aſſiſt the noble Priſoner at the Bar in all Matters of Law that may ariſe in the Courſe of the Trial.

I ſhall ſubmit with great Deference to your Lordſhips, that the preſent Stage of the Buſineſs is the proper Seaſon to introduce the Sentence which has been mentioned to the Court.

My Lords, The Sentence is conceived to be concluſive upon the Fact of that Marriage, which is the Ground of this Indictment. The Indictment ſuppoſes that the Priſoner at the Bar was married to *Auguſtus John Hervey*: The Sentence now offered to your Lordſhips is not only of a competent Juriſdiction to decide that Queſtion, but the only conſtitutional Juriſdiction.

My Lords, Whilſt this Sentence remains unimpeached, I conceive that it is concluſive againſt all Evidence to be produced of the Fact of the Marriage. It is in that Light the Priſoner is adviſed to offer it to your Lordſhips, that a Court of competent Juriſdiction having decided the Point, it will be in vain to call parole Witneſſes to the Fact; and it will only take up your Lordſhips Time, and it will be of no real Uſe to ſtate the Evidence of Witneſſes, which Witneſſes cannot appear to give that Evidence before the Court.

My Lords, The Office of a Counſel in opening the Caſe to any Court is, as I conceive, to ſtate with Clearneſs the Evidence that is to be adduced, that the Court may better underſtand and apply it: Therefore, unleſs the Evidence is competent, your Lordſhips will not hear any State of it. This too perhaps may be the Time, though I ſhall forbear at preſent to enter into it, to diſcuſs whether the Sentence be admiſſible; or, if admiſſible, whether concluſive: But we are now, my Lords, upon the Order of producing this Sentence; and if it has the Effect, which I ſhall humbly ſubmit in a proper Seaſon to your Lordſhips that it has, of being abſolutely concluſive, then the Evidence, which is now ready to be ſtated by the Counſel for the Proſecution, ought not to be produced, and of Courſe ought not to be ſtated. This is the Light in which the Cauſe appears to me at this Moment; and I truſt your Lordſhips will concur in Opinion, that if the Sentence has the concluſive Effect, which we are ready to ſubmit to your Lordſhips it has, it repels all Teſtimony, and makes it improper therefore to ſtate any. If a Precedent ſhould be thought neceſſary for what is prayed by the noble Priſoner at the Bar, I beg Leave to refer your Lordſhips to a Caſe determined at the Bar of the Court of King's Bench in the Reign of King *William:* It is reported in Mr. Serjeant *Carthew*'s Reports, 225, upon a Trial of an Ejectment. The Queſtion was, if Sir *Robert Carr* was actually married to *Iſabella Jones*, by whom he had Iſſue, and under whom the Plaintiff in that Cauſe claimed the Eſtate. The Defendant, by way of Anticipation of the Evidence which the Plaintiff was about to give, moved the Court, that the Plaintiff ought not to be allowed to prove a Marriage between them, becauſe there was a Sentence in the Arches upon a Suit of Jactitation brought againſt her; by which it was decreed, that there was no Marriage between them, but that they were free from all Matrimonial Contracts and Eſpouſals. The Sentence was then offered in Evidence by the Defendant's Counſel at the Bar to conclude the Plaintiff from any Proof of the Marriage, unleſs he could ſhew that the ſame was repealed: And upon a Debate the Court were all of Opinion that this Sentence, whilſt unrepealed, was concluſive againſt all Matters precedent; and that the Temporal Courts muſt give Credit to it, until it is reverſed; it being a Matter of mere Spiritual Cognizance: And upon this the Plaintiff was nonſuited. Your Lordſhips may perceive that this Caſe is applicable to another Part of the Buſineſs before your Lordſhips; but I cite it now merely to ſhew the Sentence was offered, and received to preclude the Examination of Witneſſes; and ſurely if Witneſſes are not admiſſible, their Teſtimony ought not to be ſtated.

Mr. Attorney General. My Lords, I do not even now comprehend the Order of Proceeding propoſed.

If there be any Thing in the preſent Motion, conſidered as propoſing a fit Manner of regulating this Trial, or as a Point of general Law; in ſhort, if their Propoſition be maintainable at all, I do aſſure your Lordſhips, that I am not anxious, or in any Degree deſirous, to ſtate a Caſe to this Audience, which muſt wound the Senſibility of the Priſoner. This I would avoid, unleſs public Juſtice, and the Neceſſity of the Proſecution, ſhould abſolutely require it of me.

If it be poſſible, on her Part, to make any Ground for ſtopping the Proſecution in this Manner, I ſhall be well content to ſtop here. To me it appears flatly impoſſible. I ſtated ſome general Hints to this Effect when I ſpoke laſt.

The learned Counſel, in attempting to make good their Propoſition of ſtopping the Trial in this Stage, have contented themſelves with a general Averment, that the Law is with them; and refer to the Manner in which Evidence was received in the particular Caſe of one Ejectment, where no Contradiction or Controverſy appears to have been raiſed among the Counſel about the Nature of the Cauſe depending, the Sentence produced, or the Parties to both. *Here* a great deal is to be previouſly ſettled on thoſe Heads.

I did not imagine the learned Counſel would have ſtopped ſo ſhortly: But if they thought well of the Motion, I expected they would have gone the Length of arguing on it, and of endeavouring to demonſtrate the Poſſibility of winding up the whole Proceeding here, by comparing the Nature of the Sentence, with the whole Compaſs of the Proſecution, ſtated with every Degree of imaginable Aggravation.

Your Lordſhips might eaſily perceive my Reaſon for expecting the Argument to take this Courſe. The Sentence may be read.—Indeed it muſt be read.—It is the only Ground of the Motion. But unleſs ſuch is demonſtrated to be the Effect of it, your Lordſhips can take no Order upon it, nor make any Uſe or Application of it, without hearing the Proſecutor's Caſe. It is not therefore enough to read the Sentence.

My Reaſon for troubling your Lordſhips at all was only to obſerve, that the Motion concludes againſt even hearing the Proſecutor; and to ſubmit, according to my humble Duty, to your Lordſhips, whether that be a Point of Law fit to hear the Priſoner upon by her Counſel. If it be, your Lordſhips will call upon the learned Counſel, whom you have allowed the Priſoner, to ſuſtain it fully in Argument. Otherwiſe your Lordſhips will reject it as inadmiſſible. All Proſecutions might be ſtopped in this Manner.

A Lord. Does Mr. Attorney General object to the reading of the Sentence?

Mr. Attorney General. Subject to the Reſervation of my Right to object to it in every Shape, when it ſhall be offered *in Evidence:* Upon that Ground I do not object to it. I am not now admitting this Sentence to be adduced *in the Courſe of the Cauſe*; or as *a Part of the Defence*; to which I ſhall ſay, it is incompetent. But I let it in, to ground a Motion anterior to the Hearing of the Cauſe. In that View, and in that View only, I admit it to be read. Indeed it ſeems to be offered as a Part of the Counſel's Speech; and I admit it as containing the Whole of the Argument, yet offered, in Support of the Motion.

That your Lordſhips may underſtand what is to be made of this Sentence when read, they muſt read, in their Order, the original Allegation of *Elizabeth Chudleigh*; the Croſs-allegation delivered in by Mr. *Hervey*; her Anſwer; the Articles on which the Proofs were taken; the Depoſitions; and the Sentence; for thus the Sentence proceeded.

Lord Mansfield. They muſt give in Evidence the whole Sentence.

(The Sentence only begun to be read.)

Mr. Attorney General. I muſt trouble your Lordſhips again.

They are now offering to read the Sentence only, without reading the Allegations of the Parties, their Articles and Proofs. For what Reaſon I very well comprehend. But I apprehend, that, if a Judgment be read in a Court of Law, they muſt read the Declaration, Plea, Replication, and all other Matters leading to the Judgment, in order to make it intelligible. Here they would read the Sentence, abſtractedly from the Allegations and other Matters, upon which that Sentence proceeded.

Lord Camden. I wiſh to know of the Counſel for the Priſoner, whether they meant to object to the whole Proceedings in the Jactitation Cauſe being read.

Mr. Wallace. I have not, upon the Part of the noble Priſoner, the leaſt Objection, that all the Proceedings ſhould be brought before your Lordſhips. I conceive that what the Officer has now brought before the Court was what is uſually given in Evidence in ſuch Caſe. I do not recollect any other, in any Caſe I have found, being produced but the Sentence, which ſtates in ſhort the Proceedings had in that Court; but I underſtand the Proceedings

are here, and on the Part of the noble Priſoner there is not the leaſt Objection to the Whole being laid before the Court.

The Lords then permitted the following Proceedings in the Jactitation Cauſe, and the Sentence pronounced in the Eccleſiaſtical Court, to be read *de bene eſſe*.

SECOND SESSION. *Michaelmas* Term 1768.

Chudleigh againſt *Hervey*. Libel given the 9th of *November* 1768. *Biſhop*.

In the Name of God, Amen, before you the Worſhipful *John Betteſworth*, Doctor of Laws, Vicar General of the Right Reverend Father in God *Richard*, by Divine Permiſſion, Lord Biſhop of *London*, and Official Principal of the Conſiſtorial Epiſcopal Court of *London* lawfully conſtituted, your Surrogate, or any other competent Judge in this Behalf of the Proctor of the Honourable *Elizabeth Chudleigh*, of the Pariſh of Saint *Margaret*, *Weſtminſter*, in the County of *Middleſex*, Spinſter; againſt the Honourable *Auguſtus John Hervey*, of the Pariſh of Saint *James's*, *Weſtminſter*, in the County of *Middleſex* and Dioceſe of *London*, a Batchelor; and againſt any other Perſon or Perſons lawfully intervening or appearing for him in Judgment before you by way of Complaint, and hereby complaining unto you in this Behalf, doth ſay, alledge, and in Law articulately propound as follows; that is to ſay,

1. THAT the ſaid Honourable *Elizabeth Chudleigh* was and is free, and no way engaged in any Matrimonial Contract or Eſpouſals with the ſaid Honourable *Auguſtus John Hervey*, and for and as a Perſon free and no way engaged, was and is commonly accounted, reputed, and taken to be amongſt her Neighbours, Friends, and familiar Acquaintance; and the Party proponent doth alledge and propound every Thing in this Article contained jointly and ſeverally.

2. That the ſaid Honourable *Auguſtus John Hervey* ſufficiently knowing the Premiſes, and, notwithſtanding the ſame, did, in the Year of our Lord One thouſand Seven hundred and Sixty-three, One thouſand Seven hundred and Sixty-four, One thouſand Seven hundred and Sixty-five, One thouſand Seven hundred and Sixty-ſix, and One thouſand Seven hundred and Sixty-ſeven, and in the ſeveral Months therein concurring, and in this preſent Year of our Lord One thouſand Seven hundred and Sixty-eight, within the Pariſh of Saint *James*, *Weſtminſter* aforeſaid, and in other Pariſhes and Places in the Neighbourhood thereof and thereto adjoining, or in all, ſome, or one of the afore-mentioned Times and Places, in the Preſence of ſeveral credible Witneſſes, falſely and maliciouſly boaſt, aſſert, and report, that he was married to or contracted in Marriage with the aforeſaid Honourable *Elizabeth Chudleigh*, whereas in Truth and Fact not any ſuch Marriage was ever ſolemnized or ever contracted between them; and this was and is true, publick, and notorious; and the Party proponent doth alledge and propound of any other Time or Times and Places as ſhall appear from the Proofs to be made in this Cauſe, and as before.

3. That the ſaid Honourable *Auguſtus John Hervey* hath been oftentimes, or at leaſt Once on the Part and Behalf of the ſaid Honourable *Elizabeth Chudleigh*, and her Friends and Acquaintance, aſked and requeſted, or deſired to deſiſt and abſtain from his aforeſaid pretended falſe and malicious boaſting, aſſerting, and reporting, as mentioned in the next preceding Article; and the Party proponent doth alledge and propound as before.

4. That the ſaid Honourable *Auguſtus John Hervey* being as aforeſaid aſked and requeſted to ceaſe, deſiſt, and abſtain from his aforeſaid pretended falſe and malicious boaſting, aſſerting, and reporting, hath not in the leaſt, nor doth in the leaſt at preſent, ceaſe, deſiſt, and abſtain therefrom, but continually with like Malice and Raſhneſs does conſtantly, falſely, and maliciouſly boaſt, aſſert, affirm, and report the ſame, to the great Danger of his Soul's Health, no ſmall Prejudice to the ſaid Honourable *Elizabeth Chudleigh*, and pernicious Example of others; and this was and is true, publick, and notorious; and the Party proponent doth alledge and propound as before.

5. That of all and ſingular the Premiſes it was and is, by and on the Part and Behalf of the ſaid Honourable *Elizabeth Chudleigh*, Spinſter, thinking herſelf greatly injured, aggrieved, and diſquieted by reaſon of the aforeſaid pretended falſe and malicious boaſting, aſſerting, and reporting of the ſaid Honourable *Auguſtus John Hervey*, rightly and duly complained

complained to you the Judge aforeſaid, and to this Court, for a fit and meet Remedy to be had and provided in this Behalf; and the Party proponent doth alledge and propound as before.

6. That the ſaid Honourable *Auguſtus John Hervey* was and is of the Pariſh of Saint *James*, *Weſtminſter*, in the County of *Middleſex* and Dioceſe of *London*, and therefore and by reaſon of the Premiſes was and is ſubject to the Juriſdiction of this Court; and the Party proponent doth alledge and propound as before.

7. That all and ſingular the Premiſes were and are true, publick, and notorious, and thereof there was and is a publick Voice, Fame, and Report, and of which legal Proof being made, the Party proponent prays Right and Juſtice to be effectually done and adminiſtered to him and his Party in the Premiſes; and alſo that by this Court it may be pronounced, decreed, and declared, that the ſaid Honourable *Elizabeth Chudleigh* at and during all the Times in this Libel mentioned was a Spinſter, and free from all Matrimonial Contracts and Eſpouſals with him the ſaid Honourable *Auguſtus John Hervey*; and that he, notwithſtanding the Premiſes, did, in the Years, Months, and Places in this Libel mentioned, or in ſome or one of them, falſely and maliciouſly boaſt, aſſert, and report that he was married to or contracted in Marriage with the ſaid Honourable *Elizabeth Chudleigh*; and that he may be enjoined perpetual Silence in the Premiſes, and obliged and compelled to ceaſe, deſiſt, and abſtain from ſuch his aforeſaid falſe and malicious Boaſtings, Aſſertions, and Reports for the Future; and that he may be condemned in the Coſts made and to be made in this Cauſe on the Part and Behalf of the ſaid Honourable *Elizabeth Chudleigh*, and compelled to the due and effectual Payment thereof by you or your definitive Sentence or final Decree to be given in this Cauſe; and further to do and decree in the Premiſes what ſhall be lawful in this Behalf, the Party proponent not obliging himſelf to prove all and ſingular the Premiſes, or to the Burthen of a ſuperfluous Proof, againſt which he proteſts; and prays, that ſo far as he ſhall prove in the Premiſes, he may obtain in his Petition the Benefit of the Law being always preſerved, humbly imploring the Aid of your Office in this Behalf.

ARTH. COLLIER.
PET. CALVERT.
WM. WYNNE.

Hervey againſt *Hervey* called *Chudleigh*. *Fountain—Biſhop.*

Which Day *Fountain*, in the Name of and as the lawful Proctor of the Right Honourable *Auguſtus John Hervey*, and as ſuch, and under that Denomination, did, by all Ways and Means which may be moſt beneficial and effectual for his ſaid Party in this Behalf, and to all Intents and Purpoſes in Law whatſoever, ſay, alledge, and in Law articulately propound as follows; to wit:

1. THAT ſome Time in the Year One thouſand Seven hundred and Forty-three, or One thouſand Seven hundred and Forty-four, the Right Honourable *Auguſtus John Hervey*, then the Honourable *Auguſtus John Hervey*, Eſquire, and Son of the Right Honourable *John* late Lord *Hervey*, became acquainted with *Elizabeth Chudleigh*, now *Hervey*, at *Wincheſter* Races; and the ſaid Honourable *Auguſtus John Hervey*, Eſquire, having conceived a Liking and Affection for the ſaid *Elizabeth Chudleigh*, and being a Batchelor, and a Minor of the Age of Seventeen or Eighteen Years, and free from any Matrimonial Contract, did privately make his Addreſſes of Love and Courtſhip to the ſaid *Elizabeth Chudleigh*, who was then alſo a Minor and a Spinſter of the Age of about Eighteen Years, and alſo free from any Matrimonial Contract; and ſhe the ſaid *Elizabeth Chudleigh*, now *Hervey*, did receive and admit ſuch his Addreſſes and Courtſhip, and entertain him as a Suiter to her in the Way of Marriage, but without the Privity or Knowledge of either of their Relations or Friends, excepting her Aunt the late Mrs. *Hanmer*, and they mutually contracted themſelves to each other; and the Party proponent doth alledge and propound of any other Time and Place, and of every Thing in this Article contained jointly and ſeverally.

2. That in the ſaid Year One thouſand Seven hundred and Forty-four, the ſaid Honourable *Auguſtus John Hervey*, Eſquire, was a Lieutenant in the Navy, and belonged to his Majeſty's Ship *Cornwall*, which in *Auguſt* One thouſand Seven hundred and Forty-four lay at *Portſmouth*; that the ſaid *Elizabeth Chudleigh*, in *July* One thouſand Seven hundred and Forty-four, being on a Viſit at *John Merrill*'s, Eſquire, at *Lainſton*, in the Pariſh of *Spar-*

ſhot,

ſhot, in the County of *Southampton*, with her Aunt Mrs. *Hanmer*, and the ſaid *Auguſtus John Hervey*, being then on board the ſaid Ship *The Cornwall* at *Portſmouth*, went from thence to the ſaid Mr. *Merrill*'s in order to ſee the ſaid *Elizabeth Chudleigh*; and the ſaid Ship being under ſailing Orders for and being ſoon to depart for the *Weſt Indies*, it was propoſed between the ſaid *Auguſtus John Hervey* and Mrs. *Hanmer*, that they the ſaid *Auguſtus John Hervey* and *Elizabeth Chudleigh* ſhould be married privately at the ſaid Mr. *Merrill*'s Houſe; and accordingly they the ſaid *Auguſtus John Hervey* and *Elizabeth Chudleigh* were, on or about the Fourth Day of *Auguſt* One thouſand Seven hundred and Forty-four, in Mr. *Merrill*'s Houſe in the Pariſh of *Sparſhot* aforeſaid, joined together in Holy Matrimony, about Eleven o'Clock at Night, by the Reverend *Thomas Amis*, ſince deceaſed, a Clergyman in Holy Orders, according to the Rites and Ceremonies of the Church of *England*, in the Preſence of Mrs. *Hanmer* the Aunt of her the ſaid *Elizabeth Chudleigh*, and Mr. *Mountnay*, both ſince deceaſed; and were then and there by him the ſaid *Thomas Amis* pronounced for and as lawful Huſband and Wife; and the Party Proponent doth alledge and propound as before.

3. That after the ſaid *Auguſtus John Hervey* and *Elizabeth Chudleigh*, now *Hervey*, were ſo privately married, they conſummated ſuch their Marriage at the ſaid Mr. *Merrill*'s Houſe, by having the Carnal Knowledge of each others Bodies, and laying for ſome time in one and the ſame Bed naked and alone, but without the Privity or Knowledge of any Part of the Family and Servants of the ſaid Mr. *Merrill*; and the Party proponent doth alledge and propound as before.

4. That the ſaid *Auguſtus John Hervey*, Eſquire, continued at the ſaid Mr. *Merrill*'s about Two or Three Days, and then returned to his ſaid Ship *Cornwall*, wherein he in *November* following ſailed for the *Weſt Indies*; and that on account of certain Circumſtances of his Family it being neceſſary that the ſaid Marriage ſhould be kept a Secret from every Perſon, except thoſe before-mentioned, therefore the ſaid *Elizabeth Hervey* continued to go by the Name of *Chudleigh* when ſhe left the ſaid Mr. *Merrill*'s, reſiding at different Places, and paſſing for a ſingle Perſon; that the ſaid *Auguſtus John Hervey*, Eſquire, remained in the *Weſt Indies* till the Month of *Auguſt* in the Year One thouſand Seven hundred and Forty-ſix, when he ſailed for *England*, and landed at *Dover* on or about the Sixteenth of *October* following; that the ſaid *Elizabeth Hervey* at that Time reſided in *Conduit-ſtreet*, where the ſaid *Auguſtus John Hervey*, Eſquire, went to ſee her as his Wife ſeveral Times, and ſhe received him and acknowledged him to be her Huſband, but they did not publickly own their Marriage, or cohabit together as Huſband and Wife, and this was and is true; and the Party proponent doth alledge and propound as before.

5. That the ſaid *Auguſtus John Hervey*, Eſquire, on the Twenty-eighth Day of the Month of *November* in the ſaid Year One thouſand Seven hundred and Forty ſix, went to Sea again, and returned to *England* in the *January* following; that the ſaid *Elizabeth Hervey* otherwiſe *Chudleigh* at that Time continued in *Conduit-ſtreet*; but ſome Differences ariſing between them on account of the Conduct of the ſaid *Elizabeth Hervey*, they continued to live ſeparate from each other for the Future; and the ſaid Honourable *Auguſtus John Hervey* thereupon forebore viſiting the ſaid *Elizabeth Hervey*, and ſome time in the Month of *May* One thouſand Seven hundred and Forty-ſeven ſailed for the *Mediterranean* Sea in the Ship called *The Princeſſa*, and continued abroad till the Month of *December* in the following Year; that from the Time they ſo continued to live ſeparate as aforeſaid to this Time the ſaid *Auguſtus John Hervey* has never viſited the ſaid *Elizabeth Hervey*, and this was and is true; and the Party proponent doth alledge and propound as before.

6. That all and ſingular the Premiſes were and are true, publick, and notorious, and therefore there was and is a publick Voice, Fame, and Report, of which legal Proof being made, the Party proponent prays Right and Juſtice to be adminiſtered to him and his Party in the Premiſes, and that it may be pronounced, that the ſaid Right Honourable *Auguſtus John Hervey* and *Elizabeth Chudleigh* were and are lawful Man and Wife.

GEO. HARRIS.

Conſiſtory

Conſiſtory of London, FOURTH SESSION of *Michaelmas* Term, 6th *December* 1768.

Chudleigh againſt *Hervey*. *Biſhop—Fountain*.

On which Day *Biſhop*, in the Name of and as lawful Proctor of the Honourable *Elizabeth Chudleigh*, Spinſter, and as ſuch, and under that Denomination, did, by all Ways and Means which may be moſt beneficial and effectual in this Behalf, and to all Intents and Purpoſes in Law whatſoever, ſay, alledge, and articulately propound as follows; to wit:

1. THAT as well before as ever ſince the pretended Time of the pretended Marriage pleaded and propounded by the Right Honourable *Auguſtus John Hervey*, the other Party in this Suit, to have been on or about the Fourth of *Auguſt* One thouſand Seven hundred and Forty-four, the ſaid Honourable *Elizabeth Chudleigh* has always paſſed as a ſingle Woman, and has always gone, been known, and been addreſſed by the Name of *Elizabeth Chudleigh*, and by no other, and hath always viſited and received Viſits as a ſingle Woman, and hath always lived ſeparate and apart from the ſaid Right Honourable *Auguſtus John Hervey*, without any Interpoſition, Let, or Hindrance of the ſaid Right Honourable *Auguſtus John Hervey*, and hath not at any Time lived or cohabited with him, or he with her; and this was and is true; and ſo much the ſaid Right Honourable *Auguſtus John Hervey* well knows and believes in his Conſcience to be true; and the Party proponent doth alledge and propound every Thing in this Article contained jointly and ſeverally.

2. That in the Year of our Lord One thouſand Seven hundred and Forty-three the ſaid *Elizabeth Chudleigh* was admitted a Maid of Honour to her Royal Highneſs the Princeſs of *Wales*; and on the Death of his Royal Highneſs the Prince of *Wales*, on or about the Seventeenth *April* One thouſand Seven hundred and Fifty-one, re-admitted and continued Maid of Honour to her Royal Highneſs the Princeſs Dowager of *Wales*, without any Let or Hindrance of the ſaid Right Honourable *Auguſtus John Hervey*, and hath during the Whole of the ſaid Time continued and now continues a Maid of Honour to her Royal Highneſs the Princeſs Dowager of *Wales*, without any Let or Hindrance of the ſaid Right Honourable *Auguſtus John Hervey*; and this was and is true; and ſo much the ſaid Right Honourable *Auguſtus John Hervey* knows and believes in his Conſcience to be true; and the Party proponent doth alledge and propound as before.

3. That in ſupply of Proof of the Premiſes mentioned in the next preceding Article, the Party proponent doth exhibit and hereunto annex Two Certificates, and Copies of the Entries from the Treaſurer's Office of the Princeſs Dowager of *Wales*, marked with the Letters A and B, of the Admiſſion of the ſaid *Elizabeth Chudleigh* as Maid of Honour, and of her Continuance now in ſuch Poſt, and prays that the ſame may be here read, and taken as if herein inſerted; and doth alledge that the ſame contain true Copies of the Entries of the ſaid *Elizabeth Chudleigh* as Maid of Honour, and was and is ſigned by Mr. *William Watts*, Deputy Treaſurer to her Royal Highneſs the Princeſs Dowager of *Wales*; and that *Elizabeth Chudleigh* therein named, and *Elizabeth Chudleigh* Party in this Suit, was and is one and the ſame Perſon and not divers; and the Party proponent doth alledge and propound as before.

4. That in the Year One thouſand Seven hundred and Fifty-three the ſaid *Elizabeth Chudleigh*, in her own Name as a Spinſter, and without any Interpoſition, Let, or Hindrance of the ſaid Right Honourable *Auguſtus John Hervey*, or his being a Party thereto or any ways concerned therein, took a Leaſe of the Right Honourable Lord *Berkeley of Stratton* of certain Land in *Hill-ſtreet*, in the Pariſh of *George*, *Hanover Square*, in the County of *Middleſex*, whereon the ſaid *Elizabeth Chudleigh* cauſed to be built a Houſe, wherein ſhe continued to live for the Space of Five Years and upwards, and afterwards ſold the ſame to *Hugo Meynell*, Eſquire, and received the Money proceeding from the Sale thereof to her own Uſe; and this was and is true; and the Party proponent doth alledge and propound as before.

5. That in ſupply of Proof of the Premiſes mentioned in the next preceding Article, the Party proponent doth exhibit and hereunto annex the original Leaſe of the Land aforementioned, dated the Fourteenth of *April* One thouſand Seven hundred and Fifty-three, executed by the ſaid Lord *Berkeley* and *John Philips*, who was intereſted therein, and thereby leaſed to the ſaid *Elizabeth Chudleigh*, Spinſter, her Executors, Adminiſtrators, and Aſſigns, for the Term of Eighty-ſeven Years, and marked with the Letter C, and prays that the ſame may be here read, and taken as if herein inſerted; and doth alledge that every Thing was ſo had and done as is therein contained, and that *Elizabeth Chudleigh*, Spinſter, therein mentioned, and *Elizabeth Chudleigh*, Spinſter, Party in this Cauſe, was and is one and the ſame Perſon and

not divers; and this was and is true; and the Party proponent doth alledge and propound as before.

6. That on the Third Day of *February*, in the Year of our Lord One thouſand Seven hundred and Fifty-ſeven, the ſaid *Elizabeth Chudleigh*, Spinſter, was admitted a Copy-holder and Tenant to the Dean and Chapter of *Weſtminſter* for the Houſe and Land, or ſome Part thereof, wherein ſhe now lives, at *Knightſbridge*, in the County of *Middleſex*, in her own then and now Maiden Name of *Elizabeth Chudleigh*, and without any Interpoſition, Let, or Hindrance of the ſaid Right Honourable *Auguſtus John Hervey*, or without his being a Party thereto or any ways concerned therein; and this was and is true; and the Party proponent doth alledge and propound as before.

7. That in Supply of Proof of the Premiſes mentioned in the next preceding Article, the Party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inſerted, a Copy of the Court Roll of the ſaid *Elizabeth Chudleigh*'s being admitted Tenant to the Premiſes mentioned in the next preceding Article, and marked with the Letter D; and that *Elizabeth Chudleigh* therein mentioned, and *Elizabeth Chudleigh* Party in this Cauſe, was and is one and the ſame Perſon and not divers; and the Party proponent doth alledge and propound as before.

8. That in the Year of our Lord One thouſand Seven hundred and Sixty-two the ſaid *Elizabeth Chudleigh*, Spinſter, tranſacted Buſineſs with *John Butcher* in her own Maiden Name of *Chudleigh*, and took a Leaſe from the ſaid Mr. *Butcher* of certain Lands ſituate in the Pariſh of *Kenſington*, in the County of *Middleſex*, and this without any Interpoſition, Let, or Hindrance of the ſaid Right Honourable *Auguſtus John Hervey*, or his being a Party thereto or any ways concerned therein; and in ſuch Leaſe the ſaid *Elizabeth Chudleigh* was deſcribed by the Name of *Elizabeth Chudleigh*; and this was and is true; and the Party proponent doth alledge and propound as before.

9. That in ſupply of Proof of the Premiſes mentioned in the next preceding Article, the Party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if therein inſerted, the ſaid Leaſe mentioned in the preceding Article, and marked with the Letter E; and doth alledge that every Thing was ſo had and done as therein is contained; and that *Elizabeth Chudleigh* therein named, and *Elizabeth Chudleigh*, Spinſter, Party in this Cauſe, was and is one and the ſame Perſon and not divers; and this was and is true; and the Party proponent doth alledge and propound as before.

10. That Mrs. *Ann Hanmer*, the Aunt of the ſaid *Elizabeth Chudleigh*, Spinſter, the Party proponent, and who, in the Second Article of the pretended Allegation admitted on the Part of the ſaid Right Honourable *Auguſtus John Hervey*, is pretended to have been preſent at the pretended Marriage pleaded by the ſaid *Auguſtus John Hervey*, did, in the Year One thouſand Seven hundred and Sixty-two, write a Letter with her own Hand to the ſaid *Elizabeth Chudleigh*, Spinſter, wherein ſhe addreſſes her as a ſingle Woman, therein calling her *Dear Mrs.* Chudleigh: And alſo in or about the Year following did make her Laſt Will and Teſtament, and Codicil, the Codicil not dated, but the Will bearing Date the Eleventh Day of *June* One thouſand Seven hundred and Sixty-three, and both Will and Codicil, as well as the Letter aforeſaid, are of the Hand-writing of the ſaid Mrs. *Ann Hanmer*, and ſo known to be by Perſons who have ſeen her write and ſubſcribe her Name to Writings, and are well acquainted with her Manner and Character of Hand-writing; and in which Will and Codicil, proved in the Prerogative Court of *Canterbury*, and now remaining in the Regiſtry thereof, the ſaid Mrs. *Hanmer* hath by the Will given a Silver Sugar Urn and Spoon, and by her Codicil hath given and bequeathed a Legacy of One hundred Pounds to the ſaid *Elizabeth Chudleigh*, by the Name and Deſcription of the Honourable Mrs. *Elizabeth Chudleigh*; and this was and is true; and the Party proponent doth alledge and propound as before.

11. That in Supply of Proof of the Premiſes mentioned in the next preceding Article, the Party propounding doth exhibit and hereunto annex, and prays may be here read and taken as if herein inſerted, the ſaid Letter marked with the Letter F, beginning thus; "*Sunning-*" "*Hill*, *Auguſt* the 14th—62. Dear Mrs. *Chudleigh*," and ending, "I am, dear Madam, "your ſincere Wellwiſher and humble Servant, *A. Hanmer*." And alſo doth exhibit a Copy of the ſaid Will and Codicil of the ſaid Mrs. *Hanmer*, marked with Letter G; and doth alledge that Mrs. *Hanmer*, the Aunt of the Party proponent, who wrote the ſaid Letter to the ſaid Mrs. *Chudleigh*, and who made the ſaid Will and Codicil, and Mrs. *Hanmer*, whom the ſaid Right Honourable *Auguſtus John Hervey* pretends to have been a Witneſs to his pretended Marriage, was and is one and the ſame Perſon and not divers; and that Mrs. *Chudleigh* mentioned in the ſaid Letter, and the Honourable Mrs. *Elizabeth Chudleigh* mentioned in the ſaid Laſt Will and Codicil, and *Elizabeth Chudleigh*, Spinſter, Party in this Cauſe,

was and is the ſame Perſon and not divers; and this was and is true; and the Party proponent doth alledge and propound as before.

12. That Mr. *Merrill*, at whoſe Houſe the ſaid Right Honourable *Auguſtus John Hervey* hath pleaded the ſaid pretended Marriage to have been ſolemnized, wrote Two Letters with his own Hand, and ſent them by the Poſt to the ſaid *Elizabeth Chudleigh*, Party in this Cauſe, wherein he addreſſes her as a ſingle Woman, the ſaid Letters being dated *Nov.* 1ſt, 1765, and *Nov.* 3d, 1765, written in One Sheet of Paper, and ſuperſcribed or directed thus; "To the "Honourable Mrs. *Elizabeth Chudleigh* at *Chalmington*, near *Dorcheſter*, *Dorſet*;" and in the Letter of the 3d of *Nov.* 1765 are theſe Words, to wit, "I have added your Chriſtian "Name to your Surname in the Direction of this, leſt the Word Honourable ſhould not "be ſufficient to prevent a Blunder, and the Letter ſhould be given to Mrs. *Chudleigh*. I "have met with ſo many and ſuch groſs Blunders, that I think I can never enough guard "againſt them." And the Party proponent doth alledge, that by theſe Words, "ſhould "be given to Mrs. *Chudleigh*," was meant Mrs. *Chudleigh* at *Chalmington*, Aunt to the ſaid *Elizabeth Chudleigh*, the Party proponent, at whoſe Houſe ſhe then was; and this was and is true; and the Party proponent doth alledge and propound as before.

13. That in Supply of Proof of the Premiſes in the next preceding Article mentioned, the Party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inſerted, the ſaid Two Letters mentioned in the next preceding Article, the Firſt marked with the Letter H, beginning thus, "*Lainſtone*, *November* the 1ſt, 1765. "Dear Madam, Tho' I have nothing particular to write to you upon," and ending thus, "Tho' had I mentioned it to them, Mrs. *Kelly*'s and Mrs. *Elſtob*'s would not have been "wanting. I am, dear Madam, your moſt obedient humble Servant, *John Merrill*;" and the other Letter, marked with the Letter I, beginning thus, "*November* 3d, 1765. Dear "Madam, The above as you ſee was intended to go by the laſt Poſt," and ending thus, "that I think I can never enough guard againſt them. I am, dear Madam, you moſt "obedient humble Servant, *John Merrill*." And the Party proponent doth alledge and propound that the whole Body, Subſcriptions, and Superſcription of the ſaid Letters were and are of the proper Hand-writing and Subſcription of the ſaid *John Merrill*, and ſo known and believed to be by Perſons who are well acquainted with his Manner and Character of Hand-writing and Subſcription; and that by the Words, "I have added your Chriſtian "Name to your Surname in the Direction of this," was meant and intended the Chriſtian and Surname of *Elizabeth Chudleigh*, the Party in this Suit; and that the Honourable Mrs. *Elizabeth Chudleigh* mentioned in the ſaid Superſcription, and the Honourable *Elizabeth Chudleigh*, Party in this Suit, was and is one and the ſame Perſon and not divers; and this was and is true; and the Party proponent doth alledge and propound as before.

14. That the ſaid Mr. *Merrill* hath alſo in and by his Laſt Will and Teſtament, bearing Date the Firſt Day of *January* One thouſand Seven hundred and Sixty-ſeven, proved in the Prerogative Court of *Canterbury*, and now remaining in the Regiſtry thereof, given and bequeathed a Legacy or Legacies to the ſaid *Elizabeth Chudleigh*, Spinſter, Party in this Suit, by her then and now Maiden Name of *Elizabeth Chudleigh*; and this was and is true; and the Party proponent doth alledge and propound as before.

15. That in Supply of the Premiſes mentioned in the next preceding Article, the Party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inſerted, a Copy of a Clauſe of the Will of the ſaid Mr. *Merrill*, marked with the Letter K; and doth alledge that Mr. *Merrill*, at whoſe Houſe the pretended Marriage pleaded by the ſaid Right Honourable *Auguſtus John Hervey* is ſaid to have been ſolemnized, and Mr. *Merrill* who made the ſaid Will, was and is one and the ſame Perſon and not divers; and that the Honourable *Elizabeth Chudleigh* mentioned in the ſaid Will, and the Honourable *Elizabeth Chudleigh*, Spinſter, Party in this Suit, was and is alſo one and the ſame Perſon and not divers; and this was and is true; and the Party proponent doth alledge and propound as before.

16. That in the Year of our Lord One thouſand Seven hundred and Sixty-ſix, the ſaid *Elizabeth Chudleigh* borrowed of Mr. *John Drummond* a Banker at divers Times, on Mortgage and Bond Security, in her own Name, and without any Interpoſition, Let, or Hindrance of the ſaid Right Honourable *Auguſtus John Hervey*, or his being a Party thereto, or his being any ways concerned therein, the Sum of Five thouſand One hundred and Sixty Pounds, and gave the ſaid Mr. *Drummond* a Bond for One thouſand Pounds, Part thereof, in her then and now Maiden Name of *Elizabeth Chudleigh*, and alſo mortgaged certain Premiſes ſituate in the Manor of *Knightſbridge*, in the County of *Middleſex*, in her ſaid then and now Maiden Name of *Elizabeth Chudleigh*, unto the ſaid Mr. *Drummond*, for the Repayment of the Sum of Four thouſand One hundred and Sixty Pounds to the ſaid Mr. *Drummond*, as will appear by the Original Bond and Mortgage Deed now in the Cuſtody or Power of the ſaid Mr.

Drummond,

Drummond, to which ſhe refers; and the Party proponent doth alledge that *Elizabeth Chudleigh* mentioned in the ſaid Bond and Mortgage Deed, and *Elizabeth Chudleigh*, Spinſter, Party in this Suit, was and is one and the ſame Perſon, and not divers; and this was and is true; and the Party proponent doth allege and propound as before.

17. That in Supply of Proof of the Premiſes mentioned in the next preceding Article, the Party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inſerted, the Counterpart of the ſaid Mortgage Deed, dated the Eighteenth of *April* One thouſand Seven hundred and Sixty-ſix, marked with the Letter L; and doth alledge and propound that the ſame was and is the Counterpart of the ſaid Mortgage Deed remaining in the Cuſtody or Power of the ſaid Mr. *Drummond*, as mentioned in the next preceding Article; and that *Elizabeth Chudleigh* mentioned in the ſaid Bond and Mortgage Deed, and *Elizabeth Chudleigh*, Spinſter, Party in this Suit, was and is the ſame Perſon, and not divers; and this was and is true; and the Party proponent doth alledge and propound as before.

18. That in the Month of *February* in the Year of our Lord One thouſand Seven hundred and Sixty-five, and in the Month of *June* One thouſand Seven hundred and Sixty-eight, the ſaid *Elizabeth Chudleigh*, Spinſter, borrowed of Mr. *William Field* of the *Inner Temple*, Attorney at Law, ſeveral Sums of Money, to the Amount of the Sum of One thouſand Nine hundred Pounds or thereabouts, for which ſhe gave to the ſaid Mr. *Field*, as Security, Two Bonds in her own Name of *Elizabeth Chudleigh*, without the Interpoſition, Let, or Hindrance of the ſaid *Auguſtus John Hervey*, or without his being Party thereto, or any ways concerned therein; and this was and is true; and the Party proponent doth alledge and propound as before.

19. That on or about the Twenty-fifth of *February* One thouſand Seven hundred and Fifty-ſix Adminiſtration of the Goods, Chattels, and Credits of *Harriot Chudleigh*, late of *Windſor Caſtle*, in the County of *Berks*, Widow, deceaſed, the Mother of the ſaid *Elizabeth Chudleigh*, Party in this Suit, was granted to the ſaid *William Field*, as the Attorney and for the Uſe and Benefit of *Elizabeth Chudleigh*, deſcribed in the ſaid Adminiſtration, and in the Records of the Prerogative Court of *Canterbury*, by the Name and Deſcription of *Elizabeth Chudleigh*, Spinſter, the natural and lawful Daughter, and only Child of the ſaid *Harriot Chudleigh* deceaſed, without the Interpoſition, Let, or Hindrance of the ſaid Right Honourable *Auguſtus John Hervey*, or without his being Party thereto, or any ways concerned therein; and this was and is true; and the Party proponent doth alledge and propound as before.

20. That in Supply of Proof of the Premiſes in the next preceding Article mentioned, the Party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inſerted, a Copy of the Adminiſtration Act entered on Record in the ſaid Prerogative Court of *Canterbury*, and ſigned by the Deputy Regiſtrars of the ſaid Court, or One of them, marked with the Letter M; and doth alledge that *Elizabeth Chudleigh*, Spinſter, therein mentioned, and *Elizabeth Chudleigh*, Spinſter, Party in this Cauſe, was and is one and the ſame Perſon; and this was and is true; and the Party proponent doth alledge and propound as before.

21. That the ſaid Mr. *William Field*, as the Attorney of the ſaid *Elizabeth Chudleigh*, and by virtue of a Letter of Attorney from her for that Purpoſe, given in her Name of *Elizabeth Chudleigh* to him, uſed to receive her Salary as Maid of Honour, without any Interpoſition, Let, or Hindrance of the ſaid Right Honourable *Auguſtus John Hervey*; and this was and is true; and the Party proponent doth alledge and propound as before.

22. That on or about the Fifth Day of *May* One thouſand Seven hundred and Sixty-ſix, the ſaid *Elizabeth Chudleigh*, Party in this Suit, preſented in her own Name of *Elizabeth Chudleigh*, by virtue of a Preſentation ſigned by her for that Purpoſe, the Reverend Mr. *John Julian* junior, to the Living of *Hartford*, in the County of *Devon*, who was in virtue of the ſaid Preſentation duly inſtituted and inducted to the ſaid Living, without any Interpoſition, Let, or Hindrance of the ſaid Right Honourable *Auguſtus John Hervey*, or his being a Party thereto, or any ways concerned therein; and that this was and is true; and the Party proponent doth alledge and propound as before.

23. That in Supply of the Proof of the Premiſes mentioned in the ſaid next preceding Article, the Party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inſerted, an authentic Copy of the ſaid Preſentation marked with the Letter N, ſigned by and alſo a Certificate of the Inſtitution of the ſaid Reverend *John Julian* to the ſaid Rectory of *Hartford*, ſigned by *Richard Burn*, Notary Publick, Secretary to the Lord Biſhop of *Exeter*, and marked with the Letter O; and doth alledge that *Elizabeth Chudleigh* mentioned in the ſaid Preſentation and Certificate, and

Elizabeth

Elizabeth Chudleigh, Party in this Cauſe, was and is one and the ſame Perſon, and not divers; and this was and is true; and the Party proponent doth alledge and propound as before.

24. That the ſaid *Elizabeth Chudleigh*, for many Years ſubſequent to the pretended Time of the pretended Marriage aforeſaid, kept a current Account of Caſh with the Bank of *England* in her Name of *Elizabeth Chudleigh*, and as a ſingle Woman; and alſo in all common as well as other Occurrences of Buyings and Sellings, and other Money Matters, whenever Occaſion happened, the ſaid *Elizabeth Chudleigh*, Spinſter, Party in this Suit, hath, as well before as ever ſince the pretended Time of the pretended Marriage pleaded by the ſaid Right Honourable *Auguſtus John Hervey*, conſtantly in her own Name of *Elizabeth Chudleigh*, Spinſter, tranſacted ſuch Buſineſs, by paying and receiving Money, giving and taking Receipts for the ſame, hiring and diſcharging Servants, and on all other Occaſions, without the Interpoſition, Let, or Hindrance of the ſaid Right Honourable *Auguſtus John Hervey*, or his being any ways concerned therein; and this was and is true; and the Party proponent doth alledge and propound as before.

25. That all and ſingular the Premiſes were and are true, and ſo forth.

ARTH. COLLIER.
PET. CALVERT.
WM. WYNNE.

Chudleigh againſt *Hervey*.—Sentence read and promulged the 10th of *February* 1769.

IN the Name of God, Amen; We *John Betteſworth*, Doctor of Laws, Vicar General of the Right Reverend Father in God *Richard* by Divine Permiſſion Lord Biſhop of *London*, and Official Principal of the Conſiſtorial and Epiſcopal Court of *London*, having ſeen, heard, and underſtood, and fully and maturely diſcuſſed the Merits and Circumſtances of a certain Cauſe of Jactitation of Marriage which was lately controverted, and as yet remains undetermined before us in Judgment, between the Honourable *Elizabeth Chudleigh* of the Pariſh of *Saint Margaret*, *Weſtminſter*, in the County of *Middleſex*, Spinſter, the Party, Agent, and Complainant, of the One Part, and the Right Honourable *Auguſtus John Hervey* of the Pariſh of *Saint James*, *Weſtminſter*, in the County of *Middleſex* and Dioceſe of *London*, Batchelor, falſely calling himſelf the Huſband of the ſaid Honourable *Elizabeth Chudleigh*, the Party accuſed and complained of, on the Other Part; and We rightly and duly proceeding therein, and the Parties aforeſaid lawfully appearing before Us by their Proctors reſpectively, and the Proctor of the ſaid Honourable *Elizabeth Chudleigh* praying Sentence to be given and Juſtice to be done to his Party, and the Proctor of the ſaid Right Honourable *Auguſtus John Hervey* alſo earneſtly praying Sentence and Juſtice to be done to his ſaid Party, and We having carefully looked into and duly conſidered of the whole Proceedings had and done before Us in the ſaid Cauſe, and obſerved by Law what ought to be obſerved in this Behalf, have thought fit and do thus think fit to proceed to the giving and promulging our definitive Sentence or final Decree in this ſame Cauſe in Manner and Form following (to wit):

FORASMUCH as by the Acts enacted, alledged, exhibited, propounded, proved, and confeſſed in this Cauſe We have found and clearly diſcovered, that the Proctor of the ſaid Honourable *Elizabeth Chudleigh* hath fully and ſufficiently founded and proved his Intention deduced in a certain Libel and Allegation and other Pleadings and Exhibits given in, exhibited, and admitted on her Behalf in this ſame Cauſe, and now remaining in the Regiſtry of this Court (which Libel and Allegation and other Pleadings and Exhibits We take and will have taken as if herein repeated and inſerted for Us to pronounce as herein after We ſhall pronounce); and that nothing, at leaſt effectual in Law, hath on the Part and Behalf of the ſaid Right Honourable *Auguſtus John Hervey* been excepted, deduced, exhibited, propounded, proved, or confeſſed in this ſame Cauſe, which may or ought in any wiſe to defeat, prejudice, or weaken the Intention of the ſaid Honourable *Elizabeth Chudleigh* deduced as aforeſaid; and particularly that the ſaid Right Honourable *Auguſtus John Hervey* hath totally failed in the Proof of his Allegation given in and admitted in this Cauſe, whereby he pleaded and propounded a pretended Marriage to have been ſolemnized between him and the ſaid Honourable *Elizabeth Chudleigh*, Spinſter: And therefore We *John Betteſworth*, Doctor of Laws, the Judge aforeſaid, firſt calling upon God and ſetting him alone before our Eyes, and having heard Counſel in this Cauſe, Do pronounce, decree, and declare, That the ſaid Honourable *Elizabeth Chudleigh* at and during all the Time

mentioned in the ſaid Libel given in and admitted in this Cauſe, and now remaining in the Regiſtry of this Court, was and now is a Spinſter, and free from all Matrimonial Contracts or Eſpouſals (as far as to us as yet appears) more eſpecially with the ſaid Right Honourable *Auguſtus John Hervey*; and that the ſaid Right Honourable *Auguſtus John Hervey*, notwithſtanding the Premiſes, did in the Years and Months libellate wickedly and maliciouſly boaſt and publickly aſſert (though falſely) that he was contracted in Marriage to the ſaid Honourable *Elizabeth Chudleigh*, or that they were joined or contracted together in Matrimony: Wherefore We do pronounce, decree, and declare, that perpetual Silence muſt and ought to be impoſed and enjoined the ſaid Right Honourable *Auguſtus John Hervey* as to the Premiſes libellate, which we do impoſe and enjoin him by theſe Preſents; and We do decree the ſaid Right Honourable *Auguſtus John Hervey* to be admoniſhed to deſiſt from his boaſting and aſſerting that he was contracted to or joined with the ſaid Honourable *Elizabeth Chudleigh* in Matrimony as aforeſaid; and We do alſo pronounce, decree, and declare, that the ſaid Right Honourable *Auguſtus John Hervey* ought by Law to be condemned in lawful Expences made or to be made in this Cauſe on the Part and Behalf of the ſaid Honourable *Elizabeth Chudleigh*, to be paid to the ſaid *Elizabeth Chudleigh* or her Proctor; and accordingly We do condemn him in ſuch Expences, which we tax at and moderate to the Sum of One hundred Pounds of lawful Money of *Great Britain*, beſides the Expence of a Monition for Payment on this Behalf by this Our definitive Sentence or final Decree, which We read and promulge by theſe Preſents.

ARTH. COLLIER.
PET. CALVERT.
WM. WYNNE.

J. BETTESWORTH.

This Sentence was read, promulged, and given by the within-named the Vicar General and Official Principal on *Friday* the Tenth Day of *February* in the Year of our Lord One thouſand Seven hundred and Sixty-nine, in the Dining-room adjoining to the Common-hall of *Doctors Commons*, ſituate within the Pariſh of *Saint Benedict*, near *Paul's Wharf*, *London*, there being then and there preſent the Witneſſes ſpecified in the Acts of Court, which I atteſt.

MARK HOLMAN, Notary Publick,
Deputy Regiſter.

Mr. Wallace.

Your Lordſhips are now poſſeſſed of a Sentence given by the Conſiſtory Court of the Biſhop of *London* in a Cauſe inſtituted there to try a Claim made by Mr. *Hervey* of Marriage with the Noble Priſoner; your Lordſhips find by that Sentence the Claim examined, and the Decree pronounced upon the Allegations and the Evidence given in the Cauſe, by which Decree the Noble Priſoner at the Bar is declared free from all Matrimonial Contracts and Eſpouſals with Mr. *Hervey*.

My Lords, The Noble Priſoner by the Indictment is charged, ſubſequent to this ſuppoſed Marriage to Mr. *Hervey*, to have married the late Duke of *Kingſton*.

It is for me now to ſubmit to your Lordſhips, that this Sentence is concluſive as long as it remains in Force, and that of Neceſſity it muſt be received in Evidence in all Courts and in all Places where the Subject of that Marriage can become a Matter of Diſpute.

My Lords, I don't know any Court which the Conſtitution of this Kingdom has placed the Deciſions of the Rights of Marriage in but the Eccleſiaſtical: I believe it will not be contended, that the Common Law Courts of this Country have any ſuch original Juriſdiction. Marriages may indeed incidentally come to be diſcuſſed and determined in the Courts of Common Law, and in many Caſes abſolutely neceſſary to the due Adminiſtration of Juſtice; but, my Lords, it will not be found, that where the proper Forum has given a Deciſion upon the Point, the Common Law Courts have ever taken upon themſelves to examine into the Grounds, or at all queſtion the Validity of that Sentence.

My Lords, As far as we have Books to reſort to, we find Inſtances from the earlieſt Times down to the preſent, where the Power of the Eccleſiaſtical Courts is in Terms recognized by the Common Law Courts, and where their Deciſions have been conſidered as

concluſive upon every Queſtion in which they have Juriſdiction, and eſpecially in Caſes like the preſent, particularly belonging to them.

My Lords, I don't know in the Common Law Courts any Inſtance where the Legality of Marriage can come directly in Queſtion, that the Courts have decided upon it without referring to the Biſhop, the Ordinary of the Place, to certify; unleſs the Marriage has been decided by a Suit inſtituted in the Eccleſiaſtical Courts.

Your Lordſhips will permit me to refer your Lordſhips to thoſe Authorities of Law which are to be found in our Books; and by the able Aſſiſtance which your Lordſhips Indulgence has given the Priſoner at the Bar you will more particularly have explained the Nature of the Proceedings in the Eccleſiaſtical Courts, how far and to what Purpoſes in thoſe Courts they are concluſive, and where they are open to ſuch Litigation. I ſhall beg to refer your Lordſhips to a Caſe reported by Lord Chief Juſtice *Coke* in the Fourth Part of his Reports, by the Name of *Bunting* and *Addingſhall:* In the 27th Year of the Reign of *Elizabeth*, there was a Marriage between one *Thomas Tweede* and one *Agnes Addingſhall*, and ſubſequent to this Marriage a Perſon of the Name of *Bunting* libelled againſt the Wife of *Tweede*, claiming under a Pre-contract, and the Spiritual Court enforced that Contract: Afterwards, on the Death of *Bunting*, a Queſtion aroſe between the Iſſue of the Second Marriage and the collateral Relations of *Bunting*, the collateral Relations inſiſting that the Second Marriage was utterly void, becauſe there had exiſted a Firſt Marriage, and the Huſband living at the Time of the Second.——Another Objection I ſhall ſtate to your Lordſhips was, that though it might be concluſive between the Parties, yet *Tweede* the Firſt Huſband being no Party to the Suit, nor to the Sentence which diſſolved the Marriage between them in the Eccleſiaſtical Court, it could not affect him, nor indeed any Body but the Parties: The Reſolution of the Court was, that he being then *de facto* the Huſband, though he was not a Party to the Suit nor in the Eccleſiaſtical Court, yet the Sentence againſt the Wife ſhould bind the Huſband *de facto*; and "Foraſmuch as the Cognizance "of the Right of Marriage belongs to the Eccleſiaſtical Court, and the ſame Court "has given Sentence in this Caſe, the Judges of our Law ought (although it be "againſt the Reaſon of our Law) to give Faith and Credit to their Proceedings and "Sentences, and to think that their Proceedings are conſonant to the Law of Holy "Church, for *Cuilibet in ſuo arte perito credendum eſt*, and ſo the Iſſue of the Firſt Marriage "in conſequence and upon the Credit of the Sentence were conſidered as legitimate." My Lord Chief Juſtice *Coke* has alſo reported another Caſe upon the Subject of Marriage in the 40th Year of Queen *Elizabeth*, which your Lordſhips will find in the Seventh Part of his Reports, Page 41, by the Name of *Kenn*'s Caſe, which is ſhortly this:—*Chriſtopher Kenn*, Eſquire, married *Elizabeth Stowell*, and had Iſſue; afterwards the Eccleſiaſtical Court pronounced a Sentence of Divorce between Mr. *Kenn* and the Lady, who were not of the Age of Conſent at the Time of the Marriage, and in conſequence of this Sentence he married a Second Wife: The Iſſue of the Firſt Marriage claiming the Inheritance, exhibited a Bill in the Court of Wards of that Day in order to have the Benefit of the Succeſſion, and offered to prove, that though the Sentence had been given in the Eccleſiaſtical Court on the Ground of his Father and Mother being within the Age of Conſent, yet that they were above the Age of Conſent; that in Truth they had cohabited together for Eight or Nine Years, and had Iſſue of that Marriage; there could be no Doubt, if the Matter was open to Examination, that the Firſt Marriage was effectual: For, in the firſt Place, the Parties were above the Age of Conſent, and if they had been under the Age of Conſent, yet their Cohabition together after that Age, and more eſpecially as they had Iſſue, would have been ſufficient to eſtabliſh the Marriage: It was argued too that it was open to Examination, becauſe both the Statute and Common Law of the Country take Notice of the Age of Conſent, and therefore it was equally competent to a Court of Common Law to examine into the Queſtion: As to an Eccleſiaſtical Court, it was further urged, that the Queſtion related to an Inheritance of which the Eccleſiaſtical Court had no Juriſdiction or Controul, and therefore it was a Queſtion properly before a Court of Common Law: But the Court then conceived themſelves ſo far bound by the Deciſion of the Eccleſiaſtical Court, though founded on falſe Suggeſtion, that they held the Plaintiff in that Cauſe not intitled to any Relief.

My Lords, I beg Leave to trouble your Lordſhips with the Words of the Court upon that Subject: After ſtating the Reaſons, the Book proceeds:

But it was reſolved by all the Juſtices (for it was a Reference to the Two Chief Juſtices, to Two other Juſtices, to the Chief Baron, and Two other Barons) "That the Sentence "ſhould conclude as long as it remained in Force;" and, my Lords, the Reaſons given are, "that the Eccleſiaſtical Judge has ſentenced the Contract and Marriage to be void

" and of no Effect; and although they were of the Age of Conſent, yet if the original " Contract was void and of no Effect, then there was juſt Cauſe of Divorce; and if the " Marriage had been within the Age of Conſent, the Eccleſiaſtical Judge is Judge as well " of the Aſſent as of the Firſt Contract, and what ſhall be a ſufficient Aſſent or not; and " although the Eccleſiaſtical Judge ſhews the Cauſe of his Sentence, yet foraſmuch as he " is Judge of the original Matter, that is, of the Lawfulneſs of the Marriage, We will never " examine the Cauſe, whether it be true or falſe; for of Things the Cognizance whereof " belongs to the Eccleſiaſtical Court, We ought to give Credit to their Sentences, as they " give to the Judgments in our Courts."

Your Lordſhips find here a Caſe where, according to the Facts ſtated, there was no Doubt of the Validity of the Firſt Marriage, and of the Legitimacy of the Iſſue claiming in that Cauſe; and if there had been no Sentence of the Eccleſiaſtical Court, no Doubt could have exiſted of the Right of Succeſſion: But the Sentence in the Eccleſiaſtical Court having interpoſed, the Court of Common Law conceived themſelves abſolutely bound, nay, that they had no Right to look into the Cauſe of that Sentence, for it was a Matter originally of Eccleſiaſtical Juriſdiction, and they muſt give Faith and Credit to the Sentence of the Eccleſiaſtical Judge in that Cauſe: Your Lordſhips will find that my Lord Chief Juſtice *Coke* cited a Caſe ſo long ago as the 22d of *Edward* the Fourth, where the ſame Doctrine was laid down in the Eccleſiaſtical Court having a complete and deciſive Juriſdiction upon this Point.

My Lords, Theſe Caſes from the Reporter and from the Judges who determined them, the Reporter being one, I take to be of the higheſt Authority, and acknowledging thoſe Principles which occur frequently in the Books, though not under ſolemn Deciſions, but as the received Opinions of Judges and of Lawyers from the earlieſt of Times.

My Lords, I did before mention to your Lordſhips a Caſe from *Carthew*; I ſhall not ſtate it particularly now, but only to the Point which we are now upon, that is, of the Sentence being concluſive.

My Lords, This was not, as ſuppoſed in the Argument, a *Niſi Prius* Opinion, which every Judge muſt give with the Information he carries with him, and without the Aſſiſtance of the Reſt of the Judges of the Court, but a ſolemn Deciſion in Trial at Bar in the Court of *King's Bench* in the Fourth of King *William*, when I think Lord Chief Juſtice *Holt* preſided in that Court; it was too upon a Sentence of Jactitation of Marriage, which your Lordſhips have now before you, which was there held to be concluſive Evidence, and that no Teſtimony whatever ought to be received againſt it. Your Lordſhips will take the Words of the Court upon that Occaſion: " Upon the Debate the Court were all of Opinion, " that this Sentence whilſt unrepealed was concluſive againſt all Matters precedent; and " that the Temporal Courts muſt give Credit to it until it is reverſed, being a Matter of " mere Spiritual Cognizance."

Your Lordſhips find, that in the Reign of King *William* that Notion which had from all Time prevailed was as ſtrong as ever, and that the Judges of the Court of *King's Bench* in which it was tried, were all clearly of Opinion, that a Caſe like the preſent of Jactitation of Marriage was concluſive upon the Point, till it was reverſed or repealed.

My Lords, The ſame Doctrine is laid down by my Lord Chief Juſtice *Holt*, who preſided at the Trial of this Cauſe, in a Caſe reported in *Salkeld*, 290, by the Name of *Blackham*'s Caſe: It turns upon the Claim of Property in the Goods of a Woman deceaſed; the Plaintiff proved the Goods to be in his Poſſeſſion, and to be taken away by the Defendant; againſt this Claim of the Plaintiff the Defendant ſhewed that theſe were the Goods of one *Jane Blackham* in her Life-time, and that the Defendant had taken out Letters of Adminiſtration to her, and ſo was intitled to the Goods; upon this the Plaintiff proved, that ſome few days before her Death ſhe was actually married to him; and in Anſwer to that it was inſiſted, that the Spiritual Court had determined the Right to be in the Defendant, for they could not have granted Adminiſtration to the Defendant but upon a Suppoſition that there was no ſuch Marriage, and that this Sentence being a Matter within their Juriſdiction was concluſive, and could not be gainſaid as in Evidence. My Lord Chief Juſtice *Holt*, who was the Judge ſitting at *Niſi Prius*, who determined the Caſe I laſt cited, ſays thus: " A Matter which has been directly determined by their Sentence cannot be gainſaid; " their Sentence is concluſive in ſuch Caſes, and no Evidence ſhall be admitted to prove " the contrary; but then it muſt be in Point directly tried."

My Lords, The Sentence before your Lordſhips at preſent is in a Cauſe, where the Object of the Proſecution was to queſtion the Claim of Marriage, and where the Marriage is the Point directly tried and determined; ſo that according to Lord *Holt*'s Opinion, if the Sentence be directly upon the Queſtion, it is ſo concluſive, that it is not competent for

any Court of Common Law to examine into the Matter, or receive any Evidence to contradict it.

My Lords, Theſe are Caſes as far as have happened in the Courts of Law.

I ſhall now trouble your Lordſhips with a Caſe determined in the Houſe of Lords under the Name of *Hatfield* and *Hatfield:* It came on before the Houſe of Lords in the Year 1725. The Caſe, as collected from the printed Caſes of the Times, is thus:—One *Leonard Hatfield* married *Jane Porter*, who had different Names I ſee aſſigned her, and by his Will made a Proviſion for her as his Wife: In *March* 1720 ſhe filed a Bill in the Court of Exchequer in *Ireland*, where the Subject of her Proviſion lay, againſt *Leonard Hatfield*, a Son by a former Wife, and againſt a Truſtee, to have the Benefit of the Proviſion: In *January* following the Defendant, the Son and Heir of her Huſband, having diſcovered that ſhe had been before married to one *Porter*, which *Porter* was then living, he procured a Releaſe of Part of the Proviſion from *Porter*, and filed a Croſs Bill for a Diſcovery of the Marriage and to ſtay the Proceedings upon her Bill: In this Croſs Bill he queſtioned her upon her Marriage to *Porter*; ſhe denied that ſhe had ever gone by the Name of *Porter*, but with reſpect to a Marriage with *Porter*, ſhe pleaded that ſhe ought not to make a Diſcovery, becauſe it tended to criminate herſelf; and being an Accuſation of Bigamy againſt her, the Plea by the Rules of the Court of Equity was of courſe allowed, that Court never compelling Perſons to diſcover on Oath Crimes which may be the Subject of Proſecution againſt themſelves.

My Lords, However by the Plea one pretty plainly diſcovers, that there was Reaſon to ſuppoſe ſhe was the Wife; indeed ſhe knew it—it was capable of Proof, and would be proved in the Cauſe.

My Lords, They proceeded to the Examination of the Witneſſes, and clear Evidence was given that this Woman was the Wife of *Porter*—*Porter* himſelf had confeſſed it in his Anſwer, and he had ſtated the Miniſter and the Witneſſes who were preſent at the Marriage, ſo that he gave *Hatfield* the Heir at Law an Opportunity of bringing direct Proof of the Marriage from the very Perſons preſent. This Woman, finding that ſhe would be preſſed by that Proof, had recourſe to the Eccleſiaſtical Court: She inſtituted a Suit againſt this *Porter* of Jactitation of Marriage, pending the Cauſe; and after Depoſitions taken, though not publiſhed, ſhe got *Porter* over to her Intereſt; he was willing to defeat that Releaſe which he had given, and therefore he does not enter into Proof, but appears by a Proctor for Form Sake, that a Judgment might paſs againſt him: Upon this the Eccleſiaſtical Judge decreed, as in all Cauſes of Jactitation they do where they find that there is no Marriage, that the Party libelling was free from all Matrimonial Contracts and Eſpouſals with *Porter*. In this Caſe *Porter* had given a Releaſe as her Huſband, had upon Oath in the Court of Exchequer in *Ireland* ſtated the Marriage with Preciſion, even named the Miniſter and the Witneſſes at the Marriage, yet in the Eccleſiaſtical Court he appears by a Proctor, and has Sentence paſſed againſt him, without inſiſting on the Marriage or any Defence. The Court of Exchequer in *Ireland* received this Sentence as concluſive againſt the Marriage with *Porter*; they conceived they were bound to give Credit to the Eccleſiaſtical Court. The Plaintiff in the Cauſe, knowing in what Manner he had been deceived, that in Truth *Porter* was the Huſband of this Woman, appealed to the Houſe of Lords in *England*; the Houſe of Lords here conceived, as the Court of Exchequer had done, that the Matter was determined by a competent Juriſdiction; and yet your Lordſhips ſee there was Fraud upon the Face of the Proceedings, if it had been competent to the Court to have entered into that Conſideration; but the Houſe of Lords here conceived the Matter at an End whilſt the Sentence remained in Force, and the Decree of the Court of Exchequer was affirmed: Upon the Pleading this Sentence, the Court of Exchequer in the Firſt Inſtance, the Houſe of Lords in the laſt, proceeded to determine the Matter. It is ſo taken Notice of by Sir *John Strange* in a Caſe I ſhall preſently mention. It is taken Notice of by a very laborious Compiler of the Law, Mr. *Viner:* Under his Title of Marriage, he mentions the Ground of the Determination thus:—The Legality of Marriage ſhall never be agitated in Equity, eſpecially after Sentence in the Spiritual Court in a Cauſe of Jactitation of Marriage, although the Proceedings in the Spiritual Court were only faint and colluſive.

My Lords, I take this to be a Caſe of the greateſt Authority, a Deciſion of the Houſe of Peers in this Country, and upon a Point of Jactitation of Marriage, a Sentence of the ſame Nature with the preſent before your Lordſhips.

I ſhall beg Leave to trouble your Lordſhips with a Caſe or Two more upon the Subject, which are of more modern Times: One is reported by Sir *John Strange* in the Second Part of his Reports, 960, under the Name of *Clews* and *Bathurſt*; the Action was for maliciouſly procuring the Plaintiff's Wife to exhibit Articles of the Peace againſt him, and for living

with

with her in Adultery: The Plaintiff proved the Marriage by the Parſon and a Woman, and alſo a Conſummation; to encounter which the Defendant produced a Sentence of the Conſiſtory Court of *London* in a Cauſe of Jactitation of Marriage brought by the Woman againſt the Plaintiff, wherein ſhe was declared free from all Contract, and perpetual Silence impoſed upon the Plaintiff; which Sentence was pronounced ſince the Iſſue had been joined in the Cauſe; and the Chief Juſtice ruled this to be concluſive Evidence till reverſed by Appeal, and the Plaintiff was Non-ſuited. Your Lordſhips find here was a Cauſe rightly brought, clear Proof of the Marriage made at the Trial by the Witneſſes preſent, no Doubt of the Fact, but the Production of a Sentence in the Eccleſiaſtical Court in Diſaffirmance of that Marriage; a Sentence of Jactitation; the Chief Juſtice who tried the Cauſe conſidered the Buſineſs as concluded; that it was of no Conſequence when the Deciſion was made; if the Moment before the Trial, it was enough, being by a Court having the proper and the ſole Juriſdiction of the Matter, and whoſe Opinion muſt be deciſive; and therefore though the Cauſe had been brought before any Suit inſtituted in the Eccleſiaſtical Court, though there was no Doubt of the Foundation for that Cauſe, yet the Sentence is permitted to have Effect, and to non-ſuit that Plaintiff who had been injured in the Manner the Caſe ſtates.

My Lords, There was too, at the ſame Sittings, another Caſe which is reported in the following Page by Sir *John Strange*, of *Da Coſta* and *Villa Real*, which was an Action upon a Contract of Marriage, *per Verba de futuro*, brought by the Gentleman againſt the Lady, who pleaded the uſual Plea *Non aſſumpſit*. When the Plaintiff had opened his Caſe the Defendant offered in Evidence a Sentence of the Spiritual Court in a Cauſe of Contract, where the Judge had pronounced againſt the Suit for a Solemnization in the Face of the Church, and declared Mrs. *Villa Real* free from all Contract; and the Chief Juſtice held this to be proper and concluſive Evidence; that it was a Cauſe within their Juriſdiction; that the Nature of the Contract was properly examinable by them; and therefore, as a Point determined, he non-ſuited the Plaintiff in that Cauſe, though the Plaintiff there opened, and was ready to have proved, the Fact of the Marriage before the Court; but the Sentence having interpoſed, the Court conceived they were to pay that Credit which every Court before had done in *Weſtminſter Hall*, which all Judges in every Age had done to the Eccleſiaſtical Juriſdiction in Caſes within their Juriſdiction; and finding himſelf concluded by that, defeated the Plaintiff of the Effect of this Suit. My Lords, it was in this Caſe, that the Caſe of *Hatfield* and *Hatfield* was quoted as an Authority.

My Lords, Theſe are Caſes upon the very Points of Marriage, and many of them your Lordſhips find upon the Effect and Force and Concluſion of a Sentence ſimilar to that now under Conſideration, that of a Jactitation Cauſe. My Lords, this has been more recently and within our own Memory underſtood to be Law, recognized to the Law, and decided accordingly; it is not long ago ſince an Action was brought againſt the Honourable Mr. *Thomas Hervey*, by a Tradeſman, to recover a Debt for Neceſſaries found for his Wife. On that Trial the Marriage was proved to the Satisfaction of the Jury, and the Defendant found liable to pay for thoſe Neceſſaries. Mr. *Hervey* inſtituted a Suit in the Conſiſtory Court of the Biſhop of *London* of Jactitation, and he was declared free from all Eſpouſals and Contracts of Marriage with the Lady. During the Continuance of this Sentence, though appealed from, another Creditor brought an Action againſt Mr. *Hervey*, and had to produce in Evidence the ſame Witneſſes, who had proved the Caſe of the other Creditor before any Sentence had been obtained, and had ſucceeded; but the learned Chief Juſtice who tried that Cauſe, conceived it was not then open to Examination; that though, in the Firſt Inſtance, when the Cauſe of the Firſt Creditor came to be diſcuſſed, there was no Sentence in the Eccleſiaſtical Court, and of Neceſſity the Court of Common Law muſt decide upon the Marriage; but there had then intervened a Sentence in the Eccleſiaſtical Court, which, whilſt in Force, was concluſive; and of courſe diſmiſſed the Plaintiff's Claim; and the Intent of that Appeal was to ſuſpend and reverſe that Sentence; yet while it ſtood unreverſed it was concluſive, the Fact of Marriage was open to no Examination in any Court whatſoever. This is only an Affirmance of the Principles of the Law, and the Doctrine found in the Determinations of a Thouſand Caſes which the Books furniſh.

My Lords, It is not peculiar to the Caſe of Marriage, it is the ſame in other Inſtances where the Eccleſiaſtical Courts have the Juriſdiction; it is ſo in the Probate of Wills, it is in the Granting of Letters of Adminiſtration: If a Will is forged, if a Will is fraudulently obtained of a Perſonal Eſtate, of which the Eccleſiaſtical Court has the Juriſdiction; if that Court has granted a Probate, it is not open to a Court of Common Law, it is not open to a Court of Equity to enter into the Fraud made uſe of in obtaining the Will, or to

the Forgery committed upon a Teſtator. I ſhall refer your Lordſhips to a Caſe or Two upon that Head: That of *Noel* and *Wells*, in Firſt *Levinz*'s Reports 235, in the 19th of King *Charles* the Second: It was an Action brought by the Executrix of the Huſband, and upon the Trial the Plaintiff produced the Probate of the Will in Evidence; the Defendant inſiſted the Will was forged, and the Chief Juſtice before whom it was tried was of Opinion, he could not give ſuch Evidence directly againſt the Seal of the Ordinary, in any Things within his Juriſdiction; upon which a Caſe was made for the Opinion of the Court, and a Verdict was for the Plaintiff; and the Court held that the Chief Juſtice at the Trial had done right in rejecting the Evidence of the Forgery, that no ſuch Evidence ought to be given till the Probate was repealed; they might indeed, by proving the Seal of the Ordinary forged, have Relief; but if the Seal of the Ordinary was genuine, then whatever Forgery or Fraud was committed, it was not open to the Examination of a Common Law Court.

My Lords, The ſame Doctrine is to be found in the Caſe of *Branſby* and *Kerrick* and others, which was determined by the Houſe of Lords; it was ſtated in that Caſe, that One *Robert Branſby*, the Complainant's Son, being intitled to the Reverſion of a Freehold and Copyhold Eſtate expectant upon the Death of the Complainant, made his Will, by which he gave all his Real and Perſonal Eſtate to the Defendant *Kerrick*, and made him his Executor, who proved the Will in the Eccleſiaſtical Court, in common Form; afterwards, in a Conteſt in the Eccleſiaſtical Court touching the Validity of that Will, a Sentence was given in favour of the Will in the Year 1716. *Branſby*, the Father, filed a Bill in Chancery, to ſet aſide the Will for Fraud and Impoſition; Witneſſes were examined, and many Acts and Circumſtances of Impoſition were proved upon the Defendant. The Cauſe came to be heard before Lord *Macclesfield* then Chancellor, upon the 14th of *November* 1718, when his Lordſhip, ſtruck with the monſtrous Fraud and Iniquity of the Tranſaction, declared the Executor ſhould ſtand as a Truſtee for the next of Kin. Upon Appeal the Houſe of Lords reverſed the Decree, upon the Ground that it was not competent to a Court of Equity to examine into Fraud and Impoſition in a Will touching Perſonal Eſtate; that the Court of Eccleſiaſtical Juriſdiction had decided that Point; that it was no longer open to Diſcuſſion.

My Lords, The ſame Rules obtain with reſpect to every Court of competent Juriſdiction whether foreign or domeſtick; we give Credit to the Deciſions of all foreign Courts in Points within their proper Juriſdiction, and do not examine into the Facts, but are concluded by the Sentence. I will only refer your Lordſhips to a Caſe in Sir *Thomas Raymond*'s Reports 473; in the War between the *Dutch* and the *French* in the Time of *Charles* the Second, a Ship was ſeized by the *French* as a *Dutch* Ship, and condemned; the Ship being in Truth *Engliſh*, the Purchaſer, under the *French* Condemnation, brought the Ship into *England*, where the Right Owner ſeized her: Upon this an Action was brought by the Purchaſer under the Condemnation; the Defendant, the original Owner, offered to prove his Property, and that the Ship was never a *Dutch* Ship, nor was liable to be taken and condemned by the *French*; but what ſaid the Court? We muſt give Credit to the Condemnation of the Court in *France*, we are forced to give Credit to and believe that this Ship was in the Condition of a *Dutch* Ship, and ſubject to a Condemnation; and upon the Ground, that if a Court of competent Juriſdiction gives a Sentence, all other Courts muſt be bound by it, the *Engliſhman* was precluded from aſſerting his Right. It was the ſame upon a Caſe of an Inſurance, which will occur to ſome of your Lordſhips, where the Ship was warranted *Swediſh*, and condemned in the War between *England* and *France*; the Parties were concluded from inſiſting that the Ship is any longer *Swediſh* or a Neutral, becauſe a Court of competent Juriſdiction had decided the Matter. The ſame Law holds in reſpect to the Courts of Admiralty; whether Prize or not Prize, belongs to the Court of Admiralty; Juriſdiction of that Court decides upon the Subject; though they have given a wrong Deciſion, though the Facts did not warrant it, though the Judge has done it corruptly, yet it is a Sentence which the Common Law Courts muſt be bound by, wherever it comes in Litigation here; and I have known, in Point of Experience, in an Action of Treſpaſs brought here for ſeizing a Ship, where it has been before a Court of Admiralty and received a Deciſion, that the Court of Common Law no longer entertains the Cauſe, for the Queſtion of Prize or not Prize is peculiarly belonging to the Admiralty Juriſdiction, and you give Faith and Credit to that Juriſdiction. I might refer your Lordſhips too (but the Caſes are innumerable upon the Subject) to that of *Burroughs* and *Jemmino*, in *Strange*, 233, which was upon a Bill of Exchange, where by a peculiar local Cuſtom within *Leghorn*, it is competent to the Acceptor of a Bill, by a Judgment of the Court, to have his Acceptance annulled, if the Drawer becomes Bankrupt before the Bill be payable; there is no ſuch Law in this Country; yet giving Credit to the Sentence of that Court, the Court of Chancery

here would not ſend it to a Trial at Law, but determined upon the Point, that the Sentence in that Court was deciſive upon the Subject, it being a Matter within their Juriſdiction.

My Lords, In almoſt every Caſe where Judgments or Records of other Courts have been the Subject of Diſcuſſion, the Sentences of the Eccleſiaſtical Court have always been cited and argued from as concluſive upon the Subject of Diſpute, and the Courts have uniformly adopted thoſe Caſes as Law; but the Attempt has ever been to diſtinguiſh Caſes immediately before the Court from thoſe determined by the Eccleſiaſtical Juriſdiction. Your Lordſhips will find much of that in the Caſe of *Philips* and *Bury*, in *Skinner*, 468.

My Lords, There was a very late Caſe determined in the Court of Common Pleas, and which is now got into Print, reported by Mr. Serjeant *Wilſon*, which is *Biddulph* and *Ather*. It aroſe upon a Queſtion of Claim by the Duke of *Norfolk* to all Wreck within the *Cape of Bramber*, in *Suſſex*, which was proved by many Records; it was a Queſtion whether thoſe Records were admiſſible, or if admiſſible, were concluſive Evidence; the Counſel who argued in Favour of thoſe Records and the Concluſion which was to ariſe from them, compared them to the Caſe of Eccleſiaſtical Sentences, and would gladly have brought thoſe Records within that Rule; the Court in that Caſe acknowledged the Argument proper with reſpect to the Eccleſiaſtical Courts. The Court admitted that the Sentence of an Eccleſiaſtical Court, in a Matter whereof they have the ſole Cognizance, is concluſive Evidence, and Parole Evidence ſhall never be received. My Lords, there is a Manuſcript Note in Being of what the Judges particularly ſaid, and I find it was cited, as One of the Inſtances where the Sentence was concluſive, by the learned Chief Juſtice who then preſided in the Court: He ſays, if there is a Sentence in an Eccleſiaſtical Court declaring a Marriage; for Inſtance, if it could be proved by a Hundred Witneſſes that the Parties were never within 500 Miles of each other, that Evidence is not to be received, but the Judgment of the Eccleſiaſtical Court is concluſive upon the Point. In many of the Caſes I have cited to your Lordſhips the Queſtion came directly before the Court, and received a ſolemn Diſcuſſion; in ſome the Doctrine has been recognized; in none, nor in any Caſe that I know of, has it ever been doubted. My Lords, though the Caſes reſpect civil Suits, I truſt that no real Ground of Diſtinction can be made between criminal and civil Proceedings; in civil Suits, Courts go as far as poſſible to relieve Claims founded in Equity and Juſtice; in criminal Caſes, the Leaning is always to the Defendants; and therefore I ſhould conceive ſuch Evidence ſtronger in a criminal Proſecution in Favour of Innocence.

My Lords, I will take the Liberty, however, of reminding your Lordſhips of Two or Three Caſes in Criminal Law, where the ſame Doctrine has been eſtabliſhed, and the Acts of the Eccleſiaſtical Court deemed concluſive upon the Subject, until reverſed by Appeal. My Lords, in the Firſt Volume of Sir *John Strange*'s Reports, 481, your Lordſhips will find a Caſe that happened at the *Old Bailey* in the 8th of *George* the Firſt; it was an Indictment for forging a Will of a Perſonal Eſtate. On the Trial the Forgery was proved; but the Defendant producing a Probate, that was held to be concluſive Evidence in Support of the Will, and the Defendant was acquitted. This your Lordſhips ſee was a Proſecution for a very ſerious Offence indeed; a Proſecution for the Forgery of a Will: The Forgery is ſtated to have been actually proved at the Trial, but upon the Production of a Probate from the Eccleſiaſtical Court, whoſe Deciſions are final and concluſive upon ſuch Subjects, the Defendant was acquitted, and the Evidence of the Forgery rejected. It ought not to have been received, if that Circumſtance of the Probate had been diſcovered ſooner to the Court; but the Defendant, perhaps conceiving that there could be no Evidence to affect him with the Guilt of Forgery, with-held the Probate; whatever might be the Reaſon it is immaterial, he produced it in Time to ſave himſelf; for you muſt receive a Probate in the Eccleſiaſtical Court againſt the Teſtimony of Ten thouſand Witneſſes.

Your Lordſhips will find the ſame Doctrine in the ſame Book, 1ſt Sir *John Strange*'s Reports, in the Caſe of *King* and *Roberts*, where that Defendant exhibited a Will in *Doctors Commons*, as Executor, and demanded Probate; after long Conteſt it was determined in Favour of the Plaintiff; and upon an Appeal to the Delegates this Sentence was confirmed; after the Sentence the Parties, who had brought it about, fell out amongſt themſelves, and diſcovered that the Will which had been proved was a Forgery; the Manner of giving Relief was to grant a Commiſſion of Review, but the Perſon who had been diſappointed and injured by this Forgery, alſo preferred a Bill of Indictment againſt the Perſons concerned in the Act of Forgery. The Chief Juſtice refuſed to try the Cauſe whilſt the Sentence was in Force, but inſiſted that it ſhould ſtand off till the Sentence was laid out of the Caſe by the Deciſion of the Commiſſioners under that Commiſſion of Review; my Lords, in this your Lordſhips find the Doctrine recognized in the ſtrongeſt Manner.

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The next Caſe, which came before the Court of King's Bench, is *The King* and *Gardell*; it was an Indictment proſecuted by Mr. *Crawford*, a Fellow Commoner of *Queen's College*, for Aſſault upon him. At the Trial of the Indictment the Defendant, who had acted by the Orders of the College, produced the Acts of the College by which Mr. *Crawford* was expelled. He came into the Garden of the College afterwards with an Intent to take Poſſeſſion of his Rooms, and the Officer of the College took hold of him, and conducted him out of the Limits of the College; and this was the Aſſault in that Indictment, and which was in Point of Law an Aſſault; and unleſs the Defendant had a Defence, or an Excuſe for his Acts, he muſt have been found guilty. The Act of Expulſion was given in Evidence; an Offer was made by Mr. *Crawford* to prove the Invalidity of thoſe Acts, that by the Conſtitution of this College more Perſons were neceſſary to concur in an Act of Expulſion than had been preſent at that Time, and other Objections were made to the Validity of thoſe Acts. The learned Judge, before whom that Cauſe came to be tried, conceived himſelf concluded upon this Subject; that as the College had the ſole Juriſdiction of the Cauſe, their Deciſion was concluſive upon him; and it did not ſignify upon what Grounds they had gone, for the Effect of their Judgment was an Excuſe of the Defendant, and ſo long as it remained unimpeached, and unreverſed in the proper Courſe, there could be no Doubt but it furniſhed Protection to the Defendant, or, to ſpeak more properly, a Defence againſt this Indictment. This Doctrine not being ſatisfactory to the Gentleman, he brought the Buſineſs before the Court of King's Bench, and that Court were unanimouſly of Opinion, that the Court had done right at the Trial of the Cauſe to reject all Evidence upon the Ground of theſe Acts of Expulſion; that the Acts themſelves, being within the Juriſdiction of the College, were ſufficient for the Defendant to avail himſelf of; and that it was not competent to the Proſecutor of that Indictment to ſhew to the Court that theſe were not regularly or orderly done, or that they were invalid in any Reſpect whatſoever. My Lords, in that Caſe the General Doctrine was recognized; that in all Courts of competent Juriſdiction their Acts, however wrong they are, yet while they remain in Force, are concluſive upon every other Court; the Caſes of Eccleſiaſtical Sentences, and many others, were then mentioned.

I might refer your Lordſhips Memory to the Caſes in Exchequer Seizures, where Condemnations are given conſtantly without a Defence almoſt, and yet all other Courts are concluded by them. It has been thought ſo extremely hard a Doctrine, that Judges have wiſhed for the Liberty of examining into the Fact, and to have the Matter fully diſcuſſed in the Courts; yet when the Matter came to be fully argued, the Reſult has ever been, that the Judgment has been found concluſive upon all other Courts whatever.

My Lords, Under theſe Authorities for a Succeſſion of Ages, I confidently reſt that your Lordſhips will, in the preſent Cauſe, conceive the Sentence of the Eccleſiaſtical Court now produced, in a Caſe clearly within their Juriſdiction, in a Caſe in which they have the ſole Juriſdiction, to be concluſive; no Courts whatever have a direct Cognizance of Marriage but the Eccleſiaſtical Court. Suppoſe a Perſon without any Grounds whatever claims a Marriage, it may be highly injurious to the Lady; ſhe has no Remedy but by reſorting to an Eccleſiaſtical Court; becauſe there is no other Court that can bring the Matter immediately and directly in Queſtion: If a Woman ſeparate from her lawful Huſband, what Court is there to compel her to cohabit with him but the Cenſure of the Eccleſiaſtical Court? It is that *Forum*, which the Conſtitution of this Country has intruſted with the Deciſion of the Legality of Marriages.

As there are not to be found in Common Law, or Eccleſiaſtical Courts, any Deciſion contrary to thoſe I have, with great Deference, already ſubmitted to your Lordſhips Conſideration, I truſt your Lordſhips will give that Determination upon the Validity and Effect of this Sentence, which Courts of Law have ever done, when a Sentence of the ſame Kind has been a Matter of Diſcuſſion.

Mr. Mansfield.

My Lords,

I am alſo to trouble your Lordſhips in Support of that Sentence, which has been offered to you as concluſive upon the preſent Occaſion. The Sentence having been read to your Lordſhips, you are now apprized of the Contents of it. The Proceedings in the Eccleſiaſtical Court, of which the noble Lady at the Bar hopes to avail herſelf, begin, as your Lordſhips have heard, by a Complaint on her Part, that Mr. *Hervey* did, before that Suit was commenced, improperly and without Ground lay Claim to her as his Wife; in other Words, in the Language uſed in that Court, that he did jactitate that the Lady was his Wife. The Suit being thus begun, the next Proceeding in it is in the common Way, where a Perſon

thus called upon means to inſiſt upon a Marriage. The Defendant in the Suit admits that he did claim the Lady as his Wife, and contends that he had a Right to do ſo, becauſe he was lawfully married to her. Such being his Allegation, her Ladyſhip's Anſwer to it is, that there is no Foundation for his Claim; that ſhe is not, that ſhe never was his Wife; and ſhe ſtates in the Allegations made by her, which your Lordſhips have heard, a great Variety of Particulars during a very long Period of her Life, in which in the moſt publick Manner, and upon the moſt important Occaſions, ſhe was univerſally reputed, received, and acted as a ſingle Woman. After this Allegation of her's, the next Proceeding was to examine a great Variety of Witneſſes, upon the Reſult of whoſe Teſtimony follows that which is the important Part of the Buſineſs, that is, the Sentence of the Eccleſiaſtical Judge; which Sentence pronounces in the ſame Way in this as in all other Suits, where Two Parties litigate a Marriage claimed on one Side, and denied on the other; that theſe Two Parties were free from any Matrimonial Contract. If that Sentence is to have the Force, which, as it is apprehended by thoſe who ſit on this Side of the Bar, by Law it muſt have, it will of courſe follow, that this Indictment muſt fall to the Ground; becauſe the ſole Foundation of the Criminal Charge is the ſuppoſed Marriage with Mr. *Hervey*, which this Sentence, if concluſive, muſt unanſwerably prove never to have exiſted. It muſt, we ſubmit to your Lordſhips, follow as a Conſequence, that this is the proper Place and Point of Time to ſtop; it would be to no Purpoſe for your Lordſhips to ſit here to hear a long Story, the Object of which, when the Sentence was concluſive, would only be to give Pain to one whoſe Sufferings no one would wiſh to encreaſe; and at laſt, after it had been heard, no poſſible good Effect could follow from it. As Evidence ought not to be heard, if this Sentence is concluſive, becauſe it would be hearing that which could have no Intention, no Weight, no Conſequence; ſo it would be nugatory to ſtate it, and every Body would wiſh to decline the Hearing it for the Reaſons to which I alluded; and I am perſuaded, not only for the Sake of the noble Lady at the Bar, but for the Sake of preſerving that which every one will always think of great Importance, that is, Uniformity in legal Deciſions and Judicatures, that this Sentence muſt upon this Occaſion, as I believe on every one has been in which any ſuch Sentence has ever been produced in a Court, be deemed deciſive and unanſwerable.

My Lords, That it ought to be ſo upon this Occaſion, I will firſt endeavour to ſhew to your Lordſhips by conſidering the Nature of that Act of Parliament upon which the preſent Proſecution is founded, and the State of the Law before that Act of Parliament was made.

My Lords, The Act of Parliament creates no new Offence; it puniſhes nothing but what was puniſhable before; a Second Marriage while a former exiſted: Taking a Second Huſband or Wife while there was a former in being, was undoubtedly an Offence long before this Statute of King *James* the Firſt; indeed as long as the Eccleſiaſtical Conſtitution of this Country has ſubſiſted. This Act of Parliament makes no other Alteration in the Law, but as it ſubjects Perſons committing this Offence to temporal Proſecution and Puniſhment; before this Act ſuch an Offence could only be the Object of Eccleſiaſtical Cenſure and Puniſhment: But, my Lords, the Makers of this Statute never dreamt, that they were in any Reſpect altering the Eccleſiaſtical Conſtitution of this Kingdom; that they were in any Inſtance invading or breaking in upon the Rights of the Eccleſiaſtical Courts: No ſuch Thing is to be found in the Statute, nothing is to be collected from that; indeed if you might collect from the Preamble to the Act of Parliament, it will appear to every one who reads it, that it was not in the Imagination of thoſe who framed this Law, that a Second Marriage could be made the Object of Puniſhment, where there had been a Sentence, which prevented a ſuppoſed former Marriage being binding upon the Parties. When I ſay that, I allude to the Exceptions in the Act, which make no Part of your Lordſhips preſent Conſideration. But beſides that, the Preamble of the Act tells your Lordſhips what it was that the Makers of it had in View: The Preamble tells your Lordſhips, that divers evil diſpoſed Perſons being married, run out of one County into another, or into Places where they are not known, and there become to be married having another Huſband or Wife living, to the great Diſpleaſure of God and utter Undoing of divers honeſt Men's Children and others. Now it never was ſuppoſed by the Makers of this Act of Parliament, that the Perſons deſcribed in the Preamble of it would go through the Form and Ceremony of a Trial and Litigation, and obtain a Deciſion in the Eccleſiaſtical Court, before ſuch Second Marriage was to take Effect, which was to be the Object of this Law: But it is enough that in this Statute there is not any Thing that tends to diminiſh or break in upon the Dominion of the Eccleſiaſtical Court; but that the Statute left thoſe Courts and the Law relating to them juſt in the ſame Situation as they were before. Now if this was an Offence before the Act, how was it puniſhable? What would have been the Operation of ſuch a Sentence before this Law? Unqueſtionably a Perſon taking a Second Huſband or Wife,

Wife, the Firſt being living, might have been made the Subject of Puniſhment in the Eccleſiaſtical Courts. Let me ſuppoſe a Proſecution commenced for that Purpoſe by the Second Huſband or Wife, the Firſt Huſband or Wife being living: Thoſe who ſtand near me, who are much better acquainted with the Proceedings of the Eccleſiaſtical Court than myſelf, will tell your Lordſhips, that ſo long as this Sentence remains, the Relation of Huſband and Wife could not exiſt, which alone muſt be the Foundation of a Proſecution; for taking a Second Huſband upon this Statute, the Act upon which the whole Proceeding is founded, having made no Alteration in the Caſe, the Law remains the ſame. It does not follow from thence, nor are your Lordſhips to ſuppoſe it, that ſuch a Sentence as this would in the Eccleſiaſtical Court have made Adultery lawful, or have made a Marriage with a Second Huſband or Wife a good one: Certainly not; but while the Sentence ſubſiſted, it would have proved, that there was no Firſt Marriage at any Time by any Parties intereſted. Such a Sentence as this may be undone; it is a fundamental Rule in all Matrimonial Cauſes in the Eccleſiaſtical Courts, that, in their Language, *Sententia contra Matrimonium non tranſibit in rem Judicatam.* The Iſſue or the Kindred of Perſons intitled to Eſtates may have a Variety of Reaſons for impeaching Marriages. As to the continuing in a Second Marriage, the continuing in Adultery, the repeating it is only an Increaſe and Aggravation of Sin where the Firſt Marriage ought to have prevented it. At any Time there may be a Suit to reſtore and ſet up a Firſt Marriage, which has been undone by a Sentence by Accident, by Miſtake, by Colluſion, or from any other Reaſon not ſatisfactory. If all the Evidence that could have been had reſpecting the Marriage, has not been laid before the Spiritual Judge, any Party who has any Intereſt may at any Time again apply to that Court, again inſtitute a Suit, offer new Evidence, have that which has been already heard, heard again, that the Marriage, if it did really exiſt, may be eſtabliſhed by a Sentence of that Court: This is I believe clear Law, and undoubted in that Judicature. If it is, then your Lordſhips are not to conclude, that by any Sanction which you give this Sentence, you either authorize Adultery, or give Effect to Second Marriages while Firſt Marriages ſubſiſt; no, at any Time that Firſt Marriage may be eſtabliſhed notwithſtanding a Sentence againſt it, when any Perſon ſhall think fit in a legal Way in ſuch Judicatures to impeach that Sentence: But all that is contended for is, that while that Sentence remains, the Matter is concluded; the Marriage cannot be proved to exiſt; the Relation of Huſband and Wife is deſtroyed.

My Lords, If this which I have now ſubmitted to your Lordſhips be, as I apprehend it is, well founded in the known Practice and Law of theſe Courts, the Conſequence I truſt will be, that this Sentence muſt now have the Effect under a Proſecution upon the preſent Act of Parliament, as it would have had in a Proſecution in the Eccleſiaſtical Court for an Adultery, or a Crime againſt the Firſt Marriage. In that Judicature, the only one which by the Laws of this Country has a regular Juriſdiction to enquire into Marriages, by a ſolemn Judgment theſe Two Parties are declared not to be married; that would have been an Anſwer to any Proſecution before the Statute. The Statute leaves the Power of the Eccleſiaſtical Courts exactly as it was before: Leaving it ſo, a Sentence pronounced by that Court in a Cauſe, in which it has clear Juriſdiction, muſt I apprehend be deciſive. But, my Lords, it is undoubted. Various Caſes, which I ſhall not trouble your Lordſhips with the Repetition of, have been mentioned, which prove that to no Purpoſe can this noble Lady at the Bar and Mr. *Hervey* be conſidered as Man and Wife, or proved to be Man and Wife while this Sentence ſubſiſts. No conjugal Duties can be exacted from one to the other: Was a Wife ſtarving in the Streets, ſhe could not in any Way oblige him to contribute to her Support. Whilſt ſuch a Sentence remains, the Woman cannot be a Wife for any beneficial Purpoſe reſulting from Matrimony: And it will be, I believe, difficult to point out one for which ſhe can be a Wife, unleſs it be for the ſingle Purpoſe of ſubjecting her to be puniſhed as a Felon for marrying a Second Huſband. I can hardly believe that any human Creature can be found, who would wiſh that the noble Lady at your Bar ſhould for this Purpoſe alone, and in this ſingle Inſtance, be deemed a Wife when ſhe can be in no other. But if there be any who wiſh it, I am ſatisfied your Lordſhips Wiſhes will go along with the Law as I underſtand it to be, if the Law be ſo: And that it will be very difficult to convince your Lordſhips, that ſhe, who was not a Wife for any other Purpoſe, ſhould he deemed a Wife in order to be ſubjected to criminal Puniſhment for an open, an avowed, and by her thought an honourable Marriage with a noble Duke.

My Lords, In every Inſtance in which an Iſſue in the Temporal Courts, in the Courts of Common Law, is joined upon Matrimony, where a Marriage is inſiſted upon on one Side and denied on the other; in every Inſtance of that Sort we know the Temporal Courts decide not; they ſend to the Spiritual Courts to have the Matter enquired into and decided

upon; nothing is more clear than that Rule of Law. So it is in Caſes of Dower; where Dower is claimed by a Widow, where it is denied that ſhe was ever lawfully married to her Huſband, the Temporal Court ſays, it has no Power to enquire into the Matter, it muſt refer it to the Spiritual Court; and the Deciſion of the Biſhop is final upon the Point. It is not only in the Caſe of Marriage, but in other Caſes, that the Deciſion of the Eccleſiaſtical Court is the only competent one, and is final and concluſive to all Purpoſes: So it is upon Queſtions of Legitimacy, where Baſtardy is alledged and denied; the Common Law Courts decide not the Point; they ſend it to the Eccleſiaſtical Court: So it is with regard to the Probate of Wills; and no Caſe can be ſtronger than that which was mentioned to your Lordſhips, where even upon a Criminal Accuſation, a Charge of Forgery, an Accuſation reſembling the preſent, a Deciſion of the Eccleſiaſtical Court in Favour of a Will was held to be concluſive Evidence upon an Indictment for Forgery, and that no Proof could be received of the Fact of Forgery in Oppoſition to ſuch a Sentence. It is not only ſo in theſe Inſtances of the Eccleſiaſtical Court, there are others with regard to Captures; the Deciſions of the Courts of Admiralty are in like Manner concluſive: So the Court of Exchequer upon Diſputes concerning the Revenue: There are many other Inſtances which might be pointed out to your Lordſhips, in which after the Sentences of Courts having competent Juriſdiction all other Courts are ſhut out from Enquiry into the Matter, however it might appear that ſuch Sentences are not founded in Truth. This Rule is ſo clear and ſo well known, that I will trouble your Lordſhips with no particular Caſes or Inſtances in which any ſuch Matter is determined; but there are ſome that have been already mentioned to your Lordſhips, and one other which I ſhall add, to which I ſhall beg your Lordſhips Attention on account of another View, which it is neceſſary for him who would contend for the full Force of this Sentence, to ſee this Subject in.

My Lords, It may be ſaid, ſomething of that has been hinted already; much we know has been talked out of Doors, not all I believe warranted by the Fact; but of that now we are not to judge or enquire: But it may be ſaid, in Anſwer to theſe Arguments giving the utmoſt Force to ſuch Sentences, let them be final and concluſive as they may, yet if a Sentence can be ſhewn to be the Effect of Agreement and Colluſion, that it ſhall not be final; that it ſhall not have a binding Force. If thoſe, who are to argue againſt the Effect of this Sentence in the Extent in which it is now endeavoured to be urged, ſhould be at Liberty to ſay, that they would attempt to ſhew that this Sentence now in Queſtion before your Lordſhips was the Effect of what is called in the Common-Law Courts, Covin or Colluſion: If there was any Ground, as I do moſt firmly believe there is not, to impute this Sentence to any ſuch Original; yet before your Lordſhips I truſt it will appear, that this is not the Place in which any ſuch Colluſion ought to be enquired into. Thoſe Courts, which the Conſtitution has truſted with the Inveſtigation and Deciſion of Matters relating to Marriage, are fully equal to the Deciſion of any ſuch Colluſion: They may undo their Sentences where they appear to be colluſive: And it is not to be preſumed that any colluſive Sentences would be encouraged in thoſe Courts. Indeed there is one ſtrong and cogent Reaſon, why no ſuch colluſive Sentences are to be feared in thoſe Courts; becauſe, as I before obſerved to your Lordſhips, a Sentence there, though concluſive while it ſtands, may at any Time be attacked or impeached by thoſe who find an Intereſt in ſo doing: And if it may, then it would be idle for Perſons to be colluſively obtaining a Sentence, when any Relations that might be affected by Iſſue of a Second Marriage; in ſhort, any Perſon who has an Intereſt might overturn and deſtroy it. This at leaſt is very obvious upon the Sentence that is now urged to your Lordſhips, and the Effect of it with regard to the preſent Proſecution; that, if it was to ſtop the preſent Proſecution, the utmoſt Conſequence that would follow from it would be this, that it could only prevent ſuch Proſecutions having Effect in Caſes in which in Truth the Parties, who had to do in the Cauſe in the Eccleſiaſtical Court, and who obtained the Sentence, were ſo circumſtanced, that it would not be the Intereſt of any human Creature to endeavour to undo their Work: And that it is not one of that Sort of Marriages, ſuch a Second Marriage, as it was the Object of this Temporal Law, the Statute of *James* the Firſt, to make the Subject of Puniſhment. It was made on account of Temporal Miſchiefs happening, as recited in the Preamble; although it is mentioned and truly mentioned in that Statute, that ſuch Second Marriages are to the Diſhonour of God, and are undoubtedly high Offences againſt Religion, and the holy Ceremony of Marriage; yet if that had been the only Evil that had been apprehended or found from ſuch Second Marriages, it is not to be believed, but that the Legiſlature of this Country would have left ſuch Marriages to have been conſidered, enquired into, and puniſhed in thoſe Courts, in which all other Offences againſt Religion are very properly only cognizable and puniſhable.

It

It was the Temporal Miſchief that produced that Law; and your Lordſhips may eaſily judge, what Apprehenſions of any Temporal Miſchief would ariſe from ſuch Weight being given to this Sentence, as is contended for from Proſecutions being ſtopped by ſuch Sentences; when it is clear that Sentence cannot do Miſchief to any human Creature, who does not chuſe to ſit down and acquieſce under it; for the remoteſt Iſſue at the greateſt Diſtance, that can be hurt, may commence a Suit in the Spiritual Court, and may therefore get rid of this Sentence. Give it therefore its utmoſt Force, let it weigh as much as is deſired in the Scale in favour of this Lady, it would only go to prevent a Proſecution, where the Marriage undone was of ſuch a Sort, that no human Creature would have an Intereſt to ſupport it. This, I obſerve to your Lordſhips, ſuppoſing that it may be urged againſt this Sentence, that it will be attempted to be proved to be produced by Agreement and Colluſion.

My Lords, There are Caſes, one of which has been already mentioned to your Lordſhips, that in Terms prove that That Colluſion is not the Subject of Temporal Enquiry, that it ought to be confined to the Spiritual Courts. There are other Caſes, which ſeem to me in Effect to prove the ſame Thing.

The Caſe of *Kenn* has already been mentioned to your Lordſhips: In that Caſe it was an Attempt by the Iſſue of that Marriage, where there had been a Divorce between the Parents of that Iſſue, to eſtabliſh the Marriage. In the Divorce the Sentence had proceeded upon the Parties not having been of marriageable Age, that is, the Man of Fourteen, the Woman of Twelve; that they had never cohabited together, or conſented to the Marriage after they had attained to marriageable Years, to the Years of Conſent as they are called. But who is it attempts to undo that Marriage?—the Child who was born of thoſe Parents, cohabiting together long after they had attained the Age of Conſent; and yet that Iſſue was not heard: No, the Sentence was held to be concluſive; a Sentence proceeding clearly upon a Ground which muſt be falſe; ſtating that the Parties were not of the Age of Conſent; ſtating that they had never conſented after they had attained that Age; when it was an undoubted Fact, indeed the Exiſtence of that Iſſue, which litigated it, proved that they muſt have conſented to the Marriage after the Age of Conſent.

The next Caſe that I would ſuggeſt to your Lordſhips is one that has not been mentioned, but which appears to me to be extremely ſtrong to the preſent Purpoſe. It is the Caſe of *Morris* and *Webber*, in *Moore*'s Reports, 225. The Caſe, in ſhort, was this: Two Perſons, one of the Name of *Berry* and the other of *Wilmot Gifford*, had been married; they had been married ſome Years; they had no Offspring; a Suit was commenced in the Spiritual Court for a Divorce; a Sentence was pronounced, which in the Words of the Book are *propter vitium perpetuum et impotentiam Generationis* in the Huſband. The Sentence having ſo proceeded, not long afterwards both theſe Parties married again, and each by the Second Marriage had ſeveral Children: Some Years afterwards a Cauſe aroſe, in which it became a Queſtion, Whether the Iſſue by the Second Marriage of the Huſband thus divorced could be legitimate? It was contended, that thoſe ſubſequent Children by that Huſband had proved, and irreſragably proved, that the Foundation of the Divorce was falſe; that there could not be that *vitium perpetuum* which was made the Ground of the Divorce. The Common-Law Court, before whom this Queſtion came, clearly held, that That was neceſſarily proved by the ſubſequent Children which that Huſband had had; but ſtill clear as it was, that this Sentence was founded in an apparent Falſhood, yet it muſt ſtand: It is the Sentence of that Court to which the Conſtitution of the Country has entruſted the Deciſion of ſuch Matters; it is not for our Courts to enquire into it; we ſhould uſurp a Juriſdiction which does not belong to us; and upon that Ground it was determined, that till that Sentence of Divorce was undone in the Eccleſiaſtical Court, it muſt be binding and concluſive, and the Iſſue of the Second Marriage muſt be deemed legitimate.

My Lords, No Caſes can well be imagined ſtronger than theſe to ſhew, that even Sentences founded in Agreement, founded on what may be called Colluſion of the Parties, are yet binding, till they are reſcinded in that Court, to which alone the Law of *England* has intruſted and confined the Conſideration of ſuch Matters.

Another Caſe, which has already been mentioned to your Lordſhips, is the Caſe of *Hatfield* and *Hatfield*, which ſeems to me alſo to decide this Point, and to decide in Terms. The Caſe has been already fully ſtated to your Lordſhips; I need therefore only point out One or Two Particulars of it: There was a Diſpute between the Heir of one *Hatfield* and a Woman, who claimed to be the Widow of the Father of that Heir; he inſiſted upon it, that ſhe was not the Wife of *Hatfield* his Father, becauſe ſhe had been married to one *Porter*; the Marriage with *Porter* was proved; *Porter*, who was a Party to the Suit in the

Court of Equity, admitted it upon his Oath: A Releaſe was obtained by the Heir from that *Porter:* In order to get rid of this Releaſe, and though the Fact of Marriage was proved in the cleareſt Terms, the Woman commenced a Suit for Jactitation of Marriage againſt *Porter* in the Spiritual Court; a Sentence upon his not appearing was pronounced in that Court againſt him, and that was held in the Houſe of Lords to be concluſive. Thoſe who went before your Lordſhips, then ſitting in Judicature, ſaid, this was a Sentence by a Court which had the alone Juriſdiction of the Matter, and while it ſtood—it muſt decide. The Books that take Notice of this Caſe expreſsly ſay, that the Sentence was conſidered—indeed after the Caſe ſtated to your Lordſhips it could not but be ſo conſidered,—as colluſive, I think is one of the Words to be found in the Books; and yet though appearing to be a feigned and colluſive Sentence, the Anſwer was, that Colluſion is to be judged of alone in the Court where the original Matter ariſes, which has alone Juriſdiction upon the Subject; no other Court can conſider it.

My Lords, I am aware that it may be ſaid in Anſwer to this Caſe, that this was in a Court of Equity, which had no Juriſdiction to enquire into Queſtions concerning Marriage in the Eccleſiaſtical Court. My Lords, that is no Anſwer; for wherever a Sentence founded in Agreement between Parties is uſed to the Prejudice of a Third Perſon, in whatever Court it is, unleſs the Subject be of ſuch a Nature that it is excluſively confined to the particular Court in which it ariſes, wherever ſuch a Sentence is attempted to be uſed againſt a Third Perſon, that Third Perſon may avail himſelf of the Colluſion upon which it is founded: For how is it, that in all common Caſes, where Queſtions ariſe about colluſive Sentences, that the Party againſt whom they are uſed gets rid of them? In order to do that no Proceeding is requiſite in the Court in which the Sentence is: No; the Perſon againſt whom it is urged ſays, however that Sentence may be between you Two who are Parties to it, however it may bind you, it is founded in Agreement between you Two, and it is nothing to me; as againſt me it is void. Thus in the common Caſe of Executors, a Creditor has a Right to be paid out of the Effects left by a dead Perſon, who is Debtor: The Executor intending to cheat the Creditor by an Agreement with another Perſon, who is no real Creditor, prevails upon him to commence a Suit, and ſuffers Judgment to paſs at the Inſtance of ſuch a Friend; by which he is made the original Creditor, and the Executor, as Repreſentative, Debtor to the Perſon ſo ſuing by Agreement. The real Creditor cannot purſue any Steps to undo the Judgment: No; he ſays, by Way of Anſwer, that Judgment is void againſt me; you Two Perſons agreeing and colluding together ſhall not turn the Forms of Law to my Prejudice: And as this may be done in one Caſe, why not in every other, where a Judgment or a Sentence founded upon Colluſion is uſed againſt a Third Perſon, who has no Way to anſwer it but by ſaying at once, it is void againſt me, however it may ſtand good between you?

This, my Lords, is the Way in which all Judgments by Colluſion or by Covin in my Knowledge are anſwered and got rid of. But in the Caſe of *Hatfield* and *Hatfield*, which I laſt alluded to, it is anſwered, that the Court of Equity, and the Houſe of Lords judging as a Court of Equity, had no Authority to enquire at all into a Matter depending in the Eccleſiaſtical Court relating to Marriage, becauſe that Court hath an excluſive Juriſdiction upon the Subject; and yet in that Caſe and in this there could be no Reaſon, I ſubmit to your Lordſhips, why, if an Agreement of the Parties could be a Ground for impeaching a Judgment, it might not be as well done in that Judicature as in this?

My Lords, When I am ſpeaking of any Arguments that one may ſuppoſe to be urged from an Attempt to prove Colluſion, there are Differences between any ſuch Judgments as are got rid of by a Third Perſon, becauſe prejudicial to him, and founded upon an Agreement between Two Parties to a Suit with which he has nothing to do: Is that the preſent Caſe? No Third Perſon, that has an Intereſt, attempts now to ſet aſide this Judgment: The Object here is to annul the Judgment as between the Parties to that Suit. In all the Caſes that can be referred to, where Queſtions ariſe upon Judgments paſſing by Agreement, intended to be levelled againſt a Third Perſon; in all ſuch Caſes, as between the Parties, the Judgment ſtands good. The Object of thoſe, who in ſuch Reſpects impeach the Judgment, is merely to prevent its having Effect againſt thoſe who are Strangers to it: But here this Judgment, this Sentence, muſt, as between the Parties, be totally undone and annihilated, or elſe it decides the Queſtion; becauſe unleſs it is undone, if it ſtands good between thoſe Two Parties till properly impeached in the Eccleſiaſtical Court, why then they are not Huſband and Wife: And this Conſideration materially diſtinguiſhes ſuch a Judgment, ſo impeached as the preſent is, from the common Caſe in which Judgments are to be affected, not ſo as to be avoided between the Parties, between whom they ſtand

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good, but as being laid aſide more properly than being avoided, ſo as not to be turned to the Prejudice of a Third Perſon, who is not a Party to them.

My Lords, Another Diſtinction which I have before ſuggeſted to your Lordſhips, which I remind your Lordſhips of, as upon the preſent Head of the Arguments I am ſuggeſting to your Lordſhips, there is this Difference between all the Caſes that can be brought before your Lordſhips upon the Head of Colluſion or Agreement; in all thoſe Caſes, in ſuch as I have alluded to, and a hundred others might be put which fall within the ſame Rule as a Judgment ſet on foot by an Executor to defraud an honeſt Creditor: In ſuch Caſes the Parties have no Way themſelves to commence a Suit to ſet aſide this Judgment; their Mode of doing it is, when the Judgment is uſed againſt them, anſwering, Whatever the Judgment may be as between you Two, as to me it is void: But there is no regular Proceſs of Law, no Suit to be commenced, by which any ſuch Judgment can be ſet aſide by a Third Perſon: There is no Suit. If it could be done at all, it muſt be done in a Manner which furniſhes Argument in Support of the preſent Sentence, becauſe it could only be done by an Application to that Court in which ſuch a Judgment is given; another Court may ſay, where it is attempted to be uſed, that if it be proved to be founded in Agreement by thoſe who are Parties to it, it ſhall not be turned againſt a Third Perſon; but no other Court but that in which the Judgment is given can ſet it aſide and annul it.

My Lords, Theſe Diſtinctions clearly appear, as I ſubmit to your Lordſhips, in ſuch Caſes where ſuch Judgments are attempted to be got rid of by Third Perſons as detrimental to their Intereſts: But I believe I can produce to your Lordſhips a Legiſlative Inſtance, that a colluſive Judgment in the Spiritual Court cannot be ſet aſide after once given; that it is final and concluſive. I have already mentioned it to your Lordſhips as one of thoſe Points ariſing in Courts of Juſtice, upon which all Conſideration is confined to the Eccleſiaſtical Courts: None is more important than a Queſtion concerning Baſtardy or Legitimacy. The Way, your Lordſhips know, in which that Queſtion is ſent to be tried by the Eccleſiaſtical Court, is this: In Actions of various Sorts, where a Perſon claims a Title by Deſcent, the Legitimacy of his Birth becomes material; if the Party againſt whom he claims ſays that he is a Baſtard, and upon that an Iſſue is joined, the Common Law Courts in which the Queſtion ariſes ſend the Matter to the Eccleſiaſtical Court to be enquired of and decided. In Anſwer to a Writ for that Purpoſe going from the Common Law Court the Eccleſiaſtical Judge makes a Certificate, and he certifies that the Party is a Baſtard, or is Legitimate: That Certificate is concluſive; it is not only concluſive between the Parties to the Suit, it is concluſive to all the World; it never can be touched or moved again; that Certificate once received, that Record in the Common Law Courts is final for ever.

My Lords, To prevent the Miſchiefs that might ariſe from ſuch Tranſactions happening by Agreement, and a falſe Certificate obtained by Colluſion, depriving Perſons of their legal Rights, various Forms are now requiſite by an Act of Parliament, which I will ſtate to your Lordſhips, that originally were not ſo. Various Proclamations are neceſſary in the Court of Chancery, and likewiſe in the Court of Common Law, in which ſuch Queſtion ariſes, in order to give univerſal Notice to all Perſons who may by Poſſibility be intereſted, that ſuch a Queſtion is to be ſent to the Eccleſiaſtical Court: But before that Act of Parliament no ſuch Proclamations were neceſſary. The Act of Parliament will ſhew your Lordſhips what then was the Effect of a colluſive Sentence in the Spiritual Court upon the Subject of Baſtardy; and the Sentence of that Court was concluſive, and could not be touched by any Temporal Judicature.

My Lords, The Act of Parliament was made in the 9th of King *Henry* the VIth, Chapter the 11th: The Title of the Act is, "Proclamations before a Writ be awarded to a Biſhop to certify Baſtardy."

My Lords, The *Preamble* of the Act before it comes to the enacting Part is very long. I need not read the Whole of it to your Lordſhips: It is in Subſtance this: "That ſeveral Perſons, who are named as petitioning in the Law, who claim, ſome as Siſters, and others as claiming under Siſters, to be Heirs of *Edmond* Earl of *Kent*, were apprehenſive of the Effect of a colluſive Certificate that would be obtained by *Eleanor* the Wife of *James* Lord *Audley*, who pretended herſelf to be the Daughter of that *Edmond* Earl of *Kent*; and the Meaning of the Act was to prevent the Effect of ſuch a colluſive Certificate, which was apprehended would be obtained by this *Eleanor* Wife of *James* Lord *Audley*; and ſtating that there was no Foundation for any ſuch Pretence. That ſhe was not the Daughter of the ſaid *Edmond*, the Act goes on to ſay; nevertheleſs the ſaid *Eleanor*, the Wife of *James*, upon great Subtilty, Proceſs imagined, privy Labour, and other Means and coloured Ways, to the Intent that ſhe ought to be certified *Mulier* by ſome Ordinary, in caſe that Baſtardy

ſhould be alledged in her Perſon, hath brought, as it is ſaid, in Examination before certain Judges in the Spiritual Court, knowing nothing of theſe Contrivances, certain ſuborned Proofs and Perſons of her Aſſent and Covin, depoſing for her, that ſhe was begotten within Marriage had and ſolemnized between the ſaid *Edmund* and *Conſtance*, late Wife of *Thomas* Lord *Deſpenſer*; ſo that it is very likely that the ſame Ordinary would certify the ſaid *Eleanor* the Wife of *James Mulier*; which Certificate ſo had and made ought, by the Law of *England*, to diſherit the ſaid Ducheſs, Duke of *York*, Earl of *Saliſbury*, Earl of *Weſtmoreland*, *John* Earl of *Typtoff*, *Alice*, *Joyce*, and *Henry*, and their Iſſue for ever, of the whole Inheritance aforeſaid." Thus your Lordſhips ſee it is ſtated that ſuch a Certificate, ſo obtained by the moſt flagrant Covin and Colluſion, which is ſtated here in this Preamble of the Act, is ſaid to have ſuch Effect, that it ought by the Law of *England* to diſinherit the Heirs and their Iſſue for ever, though a Certificate moſt palpably obtained upon the groſſeſt Fraud and Colluſion. Then it goes on to *provide*, " Whereupon the Premiſes tenderly conſidered and to eſchew ſuch ſubtle Diſheriſons, as well in the ſaid Caſe as in other Caſes like in Time to come, by the Advice and Aſſent of the Lords, and at the Requeſt of the ſaid Commons, it is ordained, ' That if *Eleanor* the Wife of *James* be certified *Mulier*, that no Manner of Certificate ſhall in anywiſe put to prejudice, bind, endamage, or conclude any Perſon, but him or his Heirs that was a Party to the Plea.' Thus it provides a Remedy in that particular Caſe: Then it goes on to *enact*, that in futureall Proceedings of this Sort ſhall be attended with different Proclamations that are ordered by that Act, that it may in future be known when ſuch Certificate will be applied for to the Spiritual Courts, and that all Parties intereſted may have Notice to make their Objections. Now, my Lords, what will be ſaid of the Effect, the Weight, the Authority of Eccleſiaſtical Sentences in this Part of the Law after the Act of Parliament? Does it not appear by this Law, that the Certificate, in other Words the Deciſion, of the Eccleſiaſtical Court in a Caſe of Baſtardy, even though founded upon Colluſion, was deciſive, when once it was formally received from the Eccleſiaſtical Judge? And if it was ſo, will it be at all a Stretch of the Authority of that Judicature now to ſay, that a Sentence in a Cauſe of Marriage, which is as peculiarly to be confined to their Juriſdiction, ought to have the ſame Force? And if it is not to have the ſame Force, will it not be breaking in upon or evading that Juriſdiction, in a Way which your Lordſhips Predeceſſors have never done, if you ſhould now ſuffer this Sentence in another Place to be impeached and overturned?

My Lords, Your Lordſhips will remark, that in thoſe Caſes which your Lordſhips have been referred to, there is one, the Caſe of Forgery, which is the Caſe of *Farr*, that is more exactly like the preſent, and where a Deciſion of the Spiritual Court upon a Will is held to be deciſive againſt the cleareſt Proof of Forgery. But with reſpect to the other Caſes, your Lordſhips will obſerve, that they are all Civil Caſes: And if this Difference and Reſpect is to be paid to Sentences by the Eccleſiaſtical Judicature in Civil Cauſes, I am ſure I need not obſerve to your Lordſhips that in Criminal Cauſes, where the noble Lady at your Lordſhips Bar is to be entitled to every Indulgence, to every Favour, theſe Deciſions do from that Conſideration acquire double Force.

My Lords, It may be ſaid, what did this Act of Parliament of *James* the Firſt mean? that when there had been ſuch a Sentence as this, though thoſe who were Parties to it knew that they were in Truth Man and Wife, that after ſuch a Sentence either of the Parties, ſo knowing that they were Man and Wife, ſhould be at Liberty to marry again without incurring the Penalties of this Statute? In Anſwer to that it may be replied, that whilſt this Sentence ſtands, if there be any Weight in the Arguments urged in Support of it, it is not to be preſumed that it was ſo, or could be ſo, known to the Parties; becauſe that was to impeach the Sentence. But another Anſwer occurs from the Act itſelf; for the Act did not mean in all Caſes to puniſh a Second Marriage, where the former Huſband and Wife were found to be living; becauſe there is an Exception in the Act, an Exception which permits, I mean ſo as not to make it puniſhable, permits a Marriage with a Second Huſband or Wife, even though the former be living, and be known to be living. Let but the Sea be placed between the Huſband and Wife for Seven Years, though they know each other to be living, the Law takes not Place; they are not the Subjects of Puniſhment: That I take to be extremely clear. The Circumſtance of Knowledge does not neceſſarily import, that a Perſon marrying a Second Huſband or Wife muſt be ſubject to the Penalties of this Law on account of that Knowledge of the Firſt Huſband or Wife being living. As to the Immorality of the Caſe, as to the Effect againſt Religion, againſt the eternal ſacred Obligation of Marriage, it remains exactly the ſame, whether the Huſband is on this Side the Channel or the other. But the Law has ſaid in that Caſe, though the Ceremony of Marriage would be thus offended againſt, though the Obligation would be ſo far violated, that a Huſband

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or Wife, knowing that the other Huſband or Wife were living, ſhould take a Second; yet that Knowledge is not ſufficient within the Act in that Inſtance to ſubject the Party to Puniſhment. It is not therefore in every Caſe that the taking a Second Huſband or Wife, even with Knowledge that there is a former ſubſiſting, will ſubject a Party to Puniſhment; that the Act ſays. It is not a Part of the preſent Queſtion before your Lordſhips. To ſuppoſe that after this Sentence the noble Lady at your Bar could be ſo well acquainted with the Eccleſiaſtical Law, as to know that this Sentence would not be binding; that is too abſurd to ſuppoſe. If a Sentence in the Eccleſiaſtical Court is to have that Weight, which it has had from the earlieſt Times; if the ſame Rule is to take Place in Criminal Courts of Judicature, and in Favour of the Criminal, which has been again and again eſtabliſhed in Civil Cauſes; then this Sentence is concluſive. There will be an End of the preſent Proſecution. And your Lordſhips will not forget what I did before take the Liberty to ſuggeſt to your Lordſhips, that giving the utmoſt Sanction to this Sentence, you never baſtardize Iſſue, you never diſturb Families, you never deprive Individuals of their Right; becauſe every human Creature, who is at all intereſted to diſpute a Sentence againſt a Marriage, who wiſhes to ſet up or ſupport it, may at any Time apply to the Eccleſiaſtical Court, and there have the Marriage ſet up again and eſtabliſhed. No Cauſe therefore can ever paſs, in which a Marriage will remain undone by ſuch a Sentence, except where there is no human Creature who thinks it worth their while to endeavour to ſupport it. And this Temporal Law may ſurely very well go uninforced while a Sentence ſtands, and on account of that Sentence, which with the utmoſt Weight and Credit given to it can produce no Temporal Miſchief. If it be wrong, if the Parties to it in procuring it did wrong, it may at any Time be undone in the Eccleſiaſtical Court; and as to the Offence againſt the Right of Marriage, againſt the religious Conſtitution of the Kingdom, that Court may at any Time effectually puniſh thoſe who have been guilty of any ſuch Offence, who have improperly married a Second Huſband or Wife, who have improperly attempted to get rid of a Marriage that was legally eſtabliſhed.

And therefore upon the Whole I ſubmit to your Lordſhips, that upon the Authorities of Law there is no Ground to impeach or attack this Sentence; that it is final, it is concluſive, of courſe no other Evidence ought to be received impeaching this Marriage; that the Indictment therefore muſt fall; and that as no Evidence can be received, it would be idle, impertinent, and of no Uſe to ſtate it.

Doctor Calvert.

My Lords,

It is my Duty likewiſe to treſpaſs a little upon your Lordſhips Patience on the ſame Side with the Gentlemen who have gone before me, though this Queſtion has been by them conſidered in the wideſt Extent of View that I believe it is capable of.

My Lords, The Motion now made by the Noble Lady at your Lordſhips Bar is this, that having that Species of Evidence which ſhe apprehends is concluſive in her Favour, and precludes the Proſecutor from going into any Evidence on his Part, it may be received by your Lordſhips as the only Matter proper to take into Conſideration.

My Lords, That Evidence which her Grace offers, is a Sentence in the Eccleſiaſtical Court, pronounced in a due Suit thereupon, in a direct Line of Marriage; the Purport of which was, that there was no Marriage ſubſiſting between the Honourable Mr. *Auguſtus Hervey* and the Noble Lady at the Bar, as the Indictment lays there was, at the Time ſhe married the late Duke of *Kingſton*, that Marriage being the ſole Foundation of this Accuſation; for if that fails, the Marriage with the Duke of *Kingſton* was perfectly innocent. If this is a Proof, ſuch a one as your Lordſhips by Law ought to abide by, that there was no ſuch Marriage ſubſiſting between them, to go into Evidence of any Sort muſt be totally nugatory.

My Lords, It is well known, that by the Conſtitution of this Kingdom there are different Courts appointed for the Litigation of different Queſtions; theſe Courts are, as the Conſtitution ſuppoſes, well adapted to the Purpoſes, and exerciſe that Juriſdiction which can take up the Point originally, and determine it directly; and it is contended, that while that Determination ſubſiſts, it ought to have its Effect in all other Places, and in all other Courts where there ſhall be Occaſion to make Uſe of it.

My Lords, This is not aſſerted only of one Species of Courts, I mean the Eccleſiaſtial Courts, but it applies, I apprehend, to Sentences of all others whatever, that when a Judgment

Judgment has been given by any Court having original and direct Juriſdiction, though that may incidentally come before another Court, yet they don't go into that Queſtion which has by a competent Judicature been before determined.

My Lords, It is true, it is impoſſible for any Courts to continue to exerciſe their Juriſdiction for any conſiderable Time without many Queſtions incidentally ariſing, which are not really and originally within their Juriſdiction, many of Eccleſiaſtical Cognizance; and for the Purpoſe of determining that Cauſe, if the incidental Point has not already had a Deciſion in an Eccleſiaſtical Court, they muſt be gone into; becauſe if they were not, there would be no End of the Interruption of Juſtice. Many Queſtions ariſe in the Eccleſiaſtical Courts, which are originally of Common Law Juriſdiction, yet the Eccleſiaſtical Court muſt go ſo far into that Conſideration, as to ſee whether the Pretence be true: For the Purpoſe only of determining the Cauſe then before that Court, they could not have originally determined this Queſtion. Suppoſe, for Inſtance, a Legatee claiming a Legacy in an Eccleſiaſtical Court, the Executor may plead a Releaſe; now the Validity or Invalidity of that Releaſe is originally cognizable by the Common Law Courts and no other, yet the Eccleſiaſtical Judge muſt ſo far take that Plea into Conſideration, as to ſee whether there is *prima Facie* a Releaſe or no: But it was pleaded in Reply, that there had been a Queſtion upon that Releaſe at Common Law, that it had been there put in Iſſue, and that there was a Verdict againſt that Releaſe. I apprehend, that no Eccleſiaſtical Judge then would think himſelf at Liberty to enter into the Queſtion, whether it was a good Releaſe or no; but the Verdict muſt be taken as true, becauſe the Court, though incidentally it was obliged to take Notice of it, has not a Juriſdiction to determine the original Queſtion.

My Lords, This may be applied to the Queſtion that is now before your Lordſhips: Marriage Cauſes are peculiarly by the Conſtitution given to the Eccleſiaſtical Courts, they alone can determine an original and direct Queſtion of Marriage as between the Parties; and if Determinations of Courts, having original and direct Juriſdiction, are to receive Weight, and meet with Credit from all other, then the Determinations of Eccleſiaſtical Courts upon Marriage ought, wherever they come in Queſtion in any other Court, likewiſe to be received as concluſive. The obvious Reaſon of this ſtrikes me to be, becauſe though every Court can determine in ſome Meaſure a Queſtion merely as applied to what is then before them, yet they cannot determine it generally, they cannot determine the very Queſtion as applicable to other Purpoſes. As for Inſtance, ſuppoſe any temporal Right under a Marriage is to be conſidered in a Common Law Court, and it may be neceſſary for that Purpoſe to enquire whether there be ſuch a Marriage; the general Queſtion, whether ſuch Perſons are to all Intents and Purpoſes Man and Wife, whether they are bound by the Obligations of Duty ariſing from that State, is certainly not to be determined but in a Court of Eccleſiaſtical Juriſdiction; and when that Court has been in Poſſeſſion of the original and general Queſtion, and has determined it, for the Common Law Court to enter into it, might be in Effect to alter and undo a Judgment, as far as the Conſideration then is before the Court, which certainly that Court has no Juriſdiction to do. That this is to be received as a general Poſition, I apprehend, is ſupportable upon this Ground; upon the great Incongruity of Sentences, which otherwiſe muſt ariſe. Now ſuppoſe there be a Sentence in a Court that has the original Juriſdiction to determine Marriages between Man and Wife; to determine upon the State of thoſe Perſons, whether they are in Fact in that Relationſhip; all Determinations upon that Queſtion in any other Court may be directly contradictory to that Sentence, which ſtill muſt remain; for the Parties will and muſt remain Man and Wife, or the contrary not Man and Wife, according as the Sentence was, if that Queſtion has been directly determined in an Eccleſiaſtical Court; and any Determination that would be given by another Court, may be contrary to that Obligation and that Connection which the Court, having a Power, has determined was between them. On theſe Conſiderations therefore, I apprehend, it is, that whenever a Queſtion of Matrimony has ariſen in any Common Law Court, if there has been no Determination in the Eccleſiaſtical Court, the Queſtion may be open; but if that Queſtion has ever come directly in point before the Court, having direct Juriſdiction to determine it, I apprehend to this Time there always has been ſuch Credit given to the Sentence, that it is taken to be concluſive and be determined between the Parties.

My Lords, This Diſtinction was made, I conceive, upon the beſt Grounds, ſo long ago as that Caſe alluded to by the learned Gentlemen who have gone before me, I mean *Kenn*'s Caſe, reported by Sir *Edward Coke*; that was in the Reign of King *James* I. In that Caſe there is cited the Caſe of *Corbett*, which was as early as *Edward* IV. Taking the Doctrine laid down upon theſe Two Caſes together, the Poſition there eſtabliſhed, and I truſt

adhered to ever ſince, is this, that when there has been a Queſtion of Marriage litigated by the Parties themſelves in a proper Court, and the Queſtion has been determined upon the Marriage, the Sentence will always hold good, till it is reverſed by that Court. So much was determined in the Caſe of *Kenn:* In the Caſe of *Corbett* it was determined, that where One of the Parties is dead, and no ſuch Sentence was had between the Parties while living, a Perſon cannot commence Proceedings in the Eccleſiaſtical Court relative to that Marriage: The Reaſon is, that then the Object of ſuch a Suit muſt be temporal Conſiderations only, it muſt be to baſtardize Iſſue, or it muſt be for ſome Purpoſes which the Eccleſiaſtical Court has not original Juriſdiction of; but the mere Queſtion of Marriage, of Connection between Man and Wife, can never come into Queſtion, nor ought it to be litigated after the Death of the Parties: Therefore, the Eccleſiaſtical Court, after the Death of the Parties, does not entertain that Suit, nor can it be legally commenced.

My Lords, There are a Variety of Caſes which have been determined that have been quoted already to your Lordſhips, and which I ſhould be very ſorry to take up your Time in repeating; but it ſeems to me on thoſe Authorities to have been eſtabliſhed, that as often as theſe Sentences have been pleaded they have been allowed, whether they were Sentences in Cauſes of Nullity, of Marriage, or in Jactitation of Marriage.

My Lords, If Danger is to be apprehended from too much Credit being given to ſuch Sentences, leſt for improper Purpoſes they might be unduly obtained, there ſeems to be leſs Danger in Queſtions that ariſe upon Marriage than in any other; for this Reaſon, that there can be no Determination againſt a Marriage but what is open to future Litigation. We all know, that in a Queſtion of Marriage any Perſon that has an Intereſt may intervene before Sentence given; and any Perſon having an Intereſt, though they have neglected to intervene in that Cauſe, might appeal within the proper Time: Nay, I will go ſo far to ſay, that if any Perſon having an Intereſt ſhould have ſo far neglected it as to omit availing himſelf of an Intervention or Appeal, yet he might ſtill come before the Court, ſhew his Intereſt, and be heard. A Marriage Cauſe goes farther ſtill; for I believe in moſt other Caſes a Determination would be for ever binding, at leaſt to the Parties; but in theſe Queſtions, I conceive it is not; for if there was to be a Queſtion between a Huſband and Wife in a Cauſe of Jactitation, and, as in this Cauſe, it was determined that there was no Marriage, yet the Party againſt whom that Sentence was obtained, I apprehend, might appear afterwards, he might produce any new Proof that he did not know of at that Time, or even if he had not produced what Proof he had, he might be heard upon it: The Reaſon of that Indulgence I take to be this: By the Canon Law a Marriage was held to be indiſſoluble, and for that Reaſon a Sentence againſt it never could be final: *Sententia contra Matrimonium nunquam tranſit in rem Judicatam.* The Canon Law, it is well known, has been received in this Country with reſpect to Marriage, particularly as to that Poſition of its being indiſſoluble. In moſt other Queſtions, as of Property, a Perſon might be bound by Time, bound by not making ſo good a Caſe as he ſhould have done; but as a Perſon cannot releaſe himſelf from the Obligations of Marriage by any Lapſe of Time, or any Neglect in ſtating his Caſe, the Queſtion is ever open; therefore theſe Caſes are certainly the leaſt dangerous, becauſe if any Body appears, who apprehends himſelf injured in this Matter, and has an Intereſt, to ſhew that this Judgment was not duly obtained, he may be heard; but while ſuch a Sentence remains unimpeached, I apprehend it is concluſive. The Sentence now before your Lordſhips is a Sentence in a Cauſe of Jactitation; it has been ſuppoſed upon the Authorities, many of which have been cited to your Lordſhips To-day, that when a Sentence determining upon this Point has been offered in any Court coming in incidentally, it has been conſtantly received: But, my Lords, it has been received with this Reſtriction, as it is laid down expreſly in *Blackham*'s Caſe, which has been already quoted, it muſt be where the Marriage has been directly in Iſſue; for if it be an incidental Point only, it would not then be ſatisfactory: In *Blackham*'s Caſe, where the Queſtion aroſe upon the Grant of an Adminiſtration, it was argued, that the Eccleſiaſtical Court having determined upon that Adminiſtration, they had virtually determined the Marriage, and therefore it was binding upon all Parties; but it was ſaid, No, the Queſtion muſt be originally and directly upon the Marriage, or it ſhall not have Effect; and the Diſtinction ſeems to be exceedingly good.

My Lords, In order to bring the preſent Caſe therefore within this Principle, it is neceſſary to ſhew, that the Sentence now under your Lordſhips Conſideration is a direct Determination upon a Marriage; becauſe if it be not, it would be liable to the Objection which I have now ſtated.

My Lords, The Proceeding is that of a Cauſe of Jactitation, which is begun by a Man or Woman: In this Cauſe it was the Woman calling upon the Perſon, who claims to be the Huſband, for having boaſted and aſſerted that Lady to be his Wife, to abſtain from ſuch Aſſertions for the future.

My Lords, Here the Queſtion originally ſeems to be, whether the Perſon called upon had ever really claimed the Lady. In that Stage of the Cauſe, if the Claim had not gone as far as a Juſtification, ſome of the Books aſſimilate this Proceeding to a Cauſe of Defamation, ſuppoſing it to be a Caſe of Words only; and when upon a Marriage being pleaded to juſtify the Claim, the Queſtion turns upon that Marriage, it may perhaps be argued, that it is not a direct Caſe of Marriage, but an incidental one only: It may not therefore be improper to conſider it in this Caſe, leſt ſuch an Obſervation ſhould be made. I take it, that when in a Cauſe of Jactitation the Defendant gives in a Plea ſtating a Marriage, and that Marriage is contradicted by the Plaintiff, though it is intended indeed as a Defence to the Accuſation for which he is called upon to anſwer, that of having claimed the Lady, yet the Queſtion then alters its Nature; the Plea is not only intended to intitle the Defendant to his Admiſſion, but the Court is then in Poſſeſſion of the Queſtion, whether there was a Marriage between the Parties, and the Determination is direct upon a Marriage: If the Marriage be proved, there is the ſame Sentence paſſed as in a Matrimonial Cauſe; there is a Sentence directly pronouncing there was a Marriage, the Parties are pronounced to be Man and Wife, and they might be admoniſhed to reſtore to each other conjugal Rites: If, on the contrary, the Defendant ſhould fail in Proof, the Determination is this, that the Party has failed in his juſtificatory Matter, and the Sentence in this Caſe goes, that the Judge has found that he has failed in the Proof of the Marriage alledged to have been had between them, he is declared to be free from all Matrimonial Contracts, and injoined not to boaſt in future; it would be therefore a Fallacy to argue, that this is not a direct Determination of the Queſtion of Marriage: It is indeed ingrafted upon the original Cauſe of Jactitation, but that is agreeable and conſonant to Practice in other Inſtances.

My Lords, It is not a monſtrous Thing to aſſert, that a Cauſe may change its Nature from its original Inſtitution.

[*At a Motion of One of the Peers Part of the Sentence read.*]

Doctor Calvert. Unacquainted as I am with the Proceedings of this high and auguſt Court, which I never had the Honor to appear in before, I conceive it is my Duty to take immediate Notice of thoſe Words which have been read, as I ſuppoſe they were called for, becauſe I ought to confine my Obſervations to them before I go any farther. The Lady, who is the Object of that Enquiry, is pronounced to be a Spinſter, as far as yet appears.

My Lords, Theſe Words are inſerted in this Sentence, and I apprehend are in every Sentence of this Nature; the Purport of which, I truſt, means this, that the Caſe is open to future Diſquiſition upon the Principles that have been already ſtated; that though the Judge determines upon the Evidence that is then before him, yet the Parties, having an Intereſt to bring that Queſtion on again, may be heard. As far as yet appears to us, ſays the Judge, the Lady is free from all Matrimonial Contracts; and as long as that Sentence remains, I mean to argue that it is a concluſive Sentence: I don't mean that the Court is precluded from another Enquiry; I have ſtated, that no Parties are precluded from another Enquiry; and I conceive the Meaning of thoſe Words are to expreſs, that according to the Light which then appears to the Court, the Court pronounces the Sentence; but a Sentence of that Sort is not from thence to be argued to be nugatory, and that the Court determines nothing; the Court determines upon what it has heard; and as long as that Sentence remains, that is the Way in which I meant to put it, it is deciſive and concluſive.

My Lords, I have ſaid, that though the Cauſe began originally upon the one Party calling on the other to juſtify his Claim as Huſband in a Cauſe of Jactitation, it is nothing monſtrous to ſuppoſe it has ſo far changed its Nature as to become a Marriage Cauſe; and I will mention other Caſes in which the Eccleſiaſtical Courts, as is well known to the Practitioners in thoſe Courts, adopt and admit of a ſimilar Practice. Suppoſe, for Inſtance, a Man was to bring a Suit againſt his Wife for the Reſtitution of Conjugal Rites; in Bar of of that Reſtitution the Woman may plead Adultery or Cruelty in the Huſband, which is certainly a Reaſon againſt admoniſhing her to return home to her Huſband; but, my Lords, this is not all that the Court would do in ſuch a Caſe, for ſhe having pleaded Adultery, that Plea becomes in Fact a Libel in the Cauſe, and it will become a Cauſe of Adultery; and I have known within my Memory, and ſince my Attendance at the Bar, Inſtances of that Sort. In a Caſe of *Mathews* and *Mathews*, determined in 1770 in the Conſiſtory of *London*, the

Wife

Wife pleaded Adultery in Bar to Reſtitution; the Cauſe went on in that Suit, and there was a Sentence of Divorce: Would any Body contend, that it was not as direct a Sentence of Divorce, as if it had been ſo originally inſtituted? And in caſe either of thoſe Parties had married again during that Divorce, and an Indictment had been preferred for Polygamy, can it be contended that this Sentence of Divorce would not be a Defence under the Proviſo in the Body of the Act?

My Lords, Another Inſtance: Suppoſe a Man brings a Suit for Separation by reaſon of Adultery againſt his Wife, the Wife may recriminate, and may give in an Allegation pleading Adultery in the Huſband; the Prayer indeed on each Side would be for a Separation; but there is a very conſiderable Difference between a Sentence for Separation formed upon a Crime being in the Man or in the Woman, whether it is at the Suit of one or the other; but if the Party that is Defendant in the original Suit ſhould go on and prove that Adultery, and the Plaintiff ſhould not, the Defendant would be intitled not only to a Diſmiſſion from the Suit the Plaintiff originally brought, but to a Separation upon Account of the Adultery pleaded by the Defendant.

I mention theſe Caſes to ſhew, that it is not enormous to ſuppoſe, that though the original Queſtion might begin in a Cauſe of Jactitation, yet the Marriage being pleaded, the Sentence either one Way or the other is and muſt be as determinate as if the Queſtion had originally been upon Marriage. There is a Caſe that was litigated in the Eccleſiaſtical Court not long ago, and which at the Time was much talked of, and is well known; I mean the Caſe of Mr. *Thomas Hervey*, who brought a Suit of Jactitation of Marriage in the Conſiſtory Court of *London* againſt Mrs. *Hervey*. In that Court a Marriage was pleaded, the Sentence was againſt that Marriage; the ſame was affirmed in the Court of Arches; but when it was appealed to the Court of Delegates, they reverſed this Judgment, and pronounced for the Marriage; pronounced not only that Mrs. *Hervey* was juſtified in her Jactitation, but pronounced expreſly and directly for the Mariage; and I believe nobody will Doubt, but that Marriage was as concluſively determined between them as if it had been originally a Marriage Cauſe, or a Suit of Nullity of Marriage. That theſe Sentences have been held to be concluſive in the Courts of Common Law where they have been offered, thoſe many Inſtances that have been mentioned ſeem to me to put it out of all Doubt.

It will not be improper to conſider what Effect a Sentence of this Sort would have in the Eccleſiaſtical Court; and I ſhall contend, that while a Sentence of this Sort is exiſting, a Wife could not be heard to have any Claim upon her Huſband; ſhe could not claim the Reſtitution of Conjugal Rites; there is no Light in which ſhe would be underſtood to be the Wife until the Marriage be again brought into Queſtion. There is a Caſe in Print that ſeems to me to go exactly to the Point I am now contending for; it is in the Caſe of *Clews* and *Bathurſt*, which has been mentioned already to your Lordſhips, as reported in *Strange* 961; but, my Lords, that Caſe is reported likewiſe in another Book, a Book lately publiſhed, which I am told is good Authority, and the Caſes well and correctly taken; it is called, Caſes in the Time of Lord *Hardwicke*, and it is to be found in Page 11. There the Caſe is ſtated a little more at large; and a Caſe is ſaid to be quoted by Dr. *Lee*, of *Melliſent* and *Melliſent* in the Year 1718; in that Caſe a Woman had claimed to be the Wife of a Mr. *Melliſent*, *Melliſent* libelled her in the Eccleſiaſtical Court in a Jactitation of Marriage; ſhe pleaded a Marriage, but failed in the Proof, and there was a Sentence, I apprehend, of the ſame Sort as in this Cauſe: After the Death of her Huſband the Woman would have made out her Right to the Adminiſtration, and for that Purpoſe ſhe pleaded her Marriage; that muſt have originally began in the inferior Court, and from the Nature of the Suit, I ſuppoſe, came from the Prerogative; but however, the Determination I am alluding to was in the Court of Delegates; it was determined, as there remained in Force a Sentence which was a Bar to her, ſhe could not be heard to make out her Caſe as a Widow to the Deceaſed. Your Lordſhips very well know, that though the Prerogative is an Eccleſiaſtical Court, yet the Juriſdiction of that Court is confined merely to Probates and Adminiſtrations, and it does not entertain Cauſes of Marriage. Mrs. *Melliſent* there claiming as the Widow of the Deceaſed in that Court where the Sentence of the Marriage could not be ſet aſide, it was held, there being a Sentence in a Cauſe of Jactitation, in which the Marriage was pronounced againſt, ſhe could not claim as Widow. In that Caſe the Prerogative Court held the ſame, as we are contending your Lordſhips will upon this Occaſion.

There was another Caſe in the Prerogative Court in the Year 1771, Lady *Mayo* againſt *Brown*. The Queſtion aroſe upon an Adminiſtration to *Gertrude Brown*, who died inteſtate. Adminiſtration had been granted to *Stephen Brown* as her Huſband, he having married her in the Year 1720. Afterwards that Adminiſtration was called in by Lady *Mayo*, a

Daughter by a former Huſband; and ſhe contended that *Brown* had no Right to that Adminiſtration, inaſmuch as at the Time he married *Gertrude* he was already the Huſband of one *Eleanor Cutts*. In Anſwer to that it was pleaded, that there had been a Suit of Jactitation of Marriage brought by *Brown* againſt *Cutts*, in which the Marriage was pronounced againſt, and he was pronounced to be free from all Matrimonial Contracts with *Eleanor*. In Anſwer to that another Plea was given, ſtating that it was a colluſive Suit, that they could ſhew Fraud and Colluſion: The Admiſſion of this Allegation came on to be debated before the Judge of the Prerogative; and thus far the Judge ſaid, there being a Sentence now in another Court (this was in the Prerogative that had not Juriſdiction of Marriage, there being a Conſiſtory of *London*) by which it is pronounced that this Perſon was free from Matrimonial Contract, this Court cannot admit this Allegation; and all Proceedings in that Court were ſtopped, that is, that Allegation was not admitted, till the Party, if ſhe thought proper, might go to the proper Court to reverſe it. Nothing has been done in that Cauſe ſince; and I conceive, in all Probability, never will: I apprehend therefore that this Sentence, which is now under your Lordſhips Conſideration, muſt, as long as it remains in Force, be held to be concluſive; for this Reaſon, becauſe though it can be enquired into, yet it is not now even in a Way of Litigation, nothing has been done to repeal it, nor are there any Steps towards it, but it remains in its full Force.

My Lords, The learned Gentlemen who have gone before me have thought proper, in order to obviate any Objections that may ariſe, to conſider what would be the Caſe, ſuppoſing it ſhould be urged by the Counſel on the other Side, that the Proſecutor would undertake to ſhew, that this was a fraudulent Sentence and obtained by Colluſion. My Lords, the Reaſon of our mentioning that is, not on Suppoſition or Belief that there would come out any ſuch Practices in the preſent Cauſe, but that, taking it up as we do as a previous Queſtion, it is our Duty to conſider it even in the moſt diſadvantageous View, and to maintain, that in no Caſe which they can ſuppoſe ought Evidence to be received againſt the Sentence; and upon that Head I apprehend that every Argument, which can be adduced to ſhew that the Conſideration of Truth or the Want of Truth in ſuch a Sentence ought not to be gone into by this Court, may with equal Propriety be applied againſt going into the Queſtion of Colluſion, becauſe that Court which gave the Sentence is open to that Enquiry, and, I apprehend, alone proper and competent to the Purpoſe. How vague and unſatisfactory muſt be the Enquiry of different Courts proceeding upon different Matter, different Principles, even the Terms made Uſe of quite different! Should they enquire into the Queſtion, whether the Proceedings were fair or not, it may be productive of Error. Suppoſe it ſhould be ſhewn in ſome Particular that there was Evidence ſupplied, how would it appear the Judgment did depend upon that Ground? Their entering into the Proof of Colluſion would be as ſtrongly exceptionable as their enquiring into the Right or Propriety of the Sentence, whether it was duly and rightfully pronounced by the Judge, which is an Exerciſe of Juriſdiction which no independent Court has over the Sentences or Judgments of another. Your Lordſhips are well acquainted, that there is no appellate Juriſdiction in a Criminal Court over an Eccleſiaſtical Court; the Queſtion can only be, whether that Sentence ſhall be received as final and concluſive: But the Method in which it was obtained, whether it was rightly and duly pronounced, are very good Queſtions for a Court of Appeal, which can reverſe that Sentence; but an Enquiry into the Method of obtaining it is improper, as long as the Sentence remains. If then a Sentence of this Sort will be held to be concluſive and ſatisfactory in all Civil Queſtions, and I conceive the Authorities which have been quoted will be ſufficient to eſtabliſh that Principle, ſurely it will much more ſtrongly apply to all criminal Caſes; becauſe your Lordſhips will ſee it to be the ſtrangeſt Propoſition to maintain, that when a Man or Woman are not to be conſidered as Huſband and Wife to any Civil Purpoſe, yet they ſhall be ſo only for the Purpoſe of Puniſhment; this ſurely would be the greateſt Abſurdity: Yet ſuppoſing the Sentence not repealed, which imports the Man and Woman are not Huſband and Wife, and ſuppoſe that be the general Sentence that ought to apply to them in every Situation whatever, though the Criminal Juriſdiction ſhould go on to paſs Cenſure upon the Perſon accuſed (for that is all the Criminal Juriſdiction can do) that will not deſtroy the Sentence in the Eccleſiaſtical Court, and they will remain not Huſband and Wife, though the Criminal Court ſhould puniſh One of them for what is ſuppoſed a Second Marriage.

My Lords, I ſuppoſe it will not be contended that a Determination before a Criminal Judicature ought to have the Effect of a Determination directly upon the Marriage: I apprehend, that in Point of Law it cannot be ſuppoſed it ſhould be ſo argued. Your Lordſhips will ſee, the Injuſtice of ſuch a Proceeding then would be prodigious, becauſe then a Criminal

Juriſdiction muſt determine upon the Rights of many Perſons who have not a Poſſibility of being heard. Keep their Queſtion in the Civil Court, adhere to the Determination of that Court that has an original Juriſdiction; there all Parties might have been heard, and they may in future, if they can ſet up any Intereſt; but a Determination in a Criminal Court, that might apply in the moſt remote Degree to determine Civil Cauſes, would be the moſt manifeſt Injuſtice, becauſe no Perſons could be heard for their Intereſt.

The Queſtion for your Lordſhips Determination, if it ſhould be ever gone into, will be upon the Marriage ſaid to be had with Mr. *Hervey*; any Determination here that may affect that Right, may affect not only the Perſons that were immediately the Parties to that Suit; but your Lordſhips ſee many Connections ariſe upon Marriage, many Relationſhips and new Claims that may be precluded by ſuch a Sentence as this. Suppoſe the Duke of *Kingſton* had had Children by his Marriage, it would be as much their Intereſt to eſtabliſh this Sentence, as it would be of Intereſt of any other to impeach it; and that ſuch Rights as theſe ſhould be determined in a Criminal Juriſdiction where the Parties cannot be heard, I apprehend, is a Poſition that never was yet maintained.

Upon theſe Principles I hope your Lordſhips will be of Opinion, that the Rule ought to be applied as well to Queſtions that can ariſe in Criminal Juriſdictions as in Civil ones. That Criminal Courts have determined upon theſe Principles, there are Caſes which have been alluded to, and which are, I apprehend, extremely pertinent: One is the Caſe of the King againſt *Vincent*, *Strange* 481, mentioned to be an Indictment for Forgery in having forged a Will: The Reporter ſays, Forgery was proved, but the Defendant produced a Probate under the Seal of the Ordinary; and it was held, that That was ſatisfactory Proof of the Validity of the Will. That is a very a ſtrong Caſe; but that there is no Right to determine upon Civil Matters in ſuch a Way as this, or even to prejudice Civil Matters, is very clear in that Report.

My Lords, There is another Caſe reported by the ſame Author Sir *John Strange* 703, the King againſt *Rhodes*, that came before the King's Bench, when Sir *Robert Raymond* was the Chief Juſtice. That was upon an Indictment likewiſe upon a Forgery for having forged a Will; that Will had been proved in the Eccleſiaſtical Courts. My Lords, it appears by this Report, that it was not only a Probate in the common Form, it was when there had been a long Litigation in the Eccleſiaſtical Courts, and when by a Decree of the Court of Delegates the Will was pronounced for; upon Application to the King's Bench for a *Habeas Corpus ad teſtificandum*, the Court there decreed not to iſſue the Writ for this Reaſon, becauſe it appeared that there was then exiſting a direct Sentence for the Will; and that Sentence, if it had been pleaded in Bar to going into the Queſtion of Forgery, I apprehend, would have been allowed to be concluſive Evidence; for the Court ſaid, it was not fitting to determine the Property on an Indictment: It likewiſe appeared, that though there had been a Sentence of the Court of the Delegates pronouncing for the Will, that yet there had been an Application for a Commiſſion of Review, ſo that it was within the Knowledge of the Court that the Cauſe was in a Means of having a Reviſion; but it was underſtood that the Sentence ſtill remained perfectly in Force, for your Lordſhips know perfectly well the Difference between an Appeal and an Application for a Commiſſion of Review: In Caſe of an Appeal, the Sentence is ſuſpended, but not ſo on an Application for a Commiſſion of Review. By the Statute of *Henry* VIII. it is provided, that the Sentence of the Delegates ſhall be final, and no Appeal ſhall be had from them; but it is now indiſputable Law that the King may by his Royal Prerogative, upon a perſonal Application, and a ſpecial Caſe laid, direct a Commiſſion for reviewing the Sentence; but there is no Appeal, the Sentence remains the ſame, unleſs the Reviewers in their Judgment ſhall think proper to reverſe it. In this Caſe it appears, that there was then exiſting a full and direct Sentence upon the Validity of that Will. It was underſtood then that this Right had been pleaded by the Defendant, and the Chief Juſtice ſtopped the Proceeding, and did not even grant that Motion which was then ſent. Theſe Two Caſes, I am told, have been recognized again in that Court in a very late Caſe of a Man who was executed for a Forgery, one *Perry*; and I am told the Judge at that Trial offered to the Priſoner to put off his Trial, if he had a Mind to make uſe of that Plea; but I am told, it was not accepted by the Priſoner, and the Trial went on: But this I am ſure, no Uſe can be made of that Caſe to ſhew, that the former Determinations were at all impeached by it, becauſe at leaſt, if the Probate was not inſiſted on by the Defendant, conſequently not over-ruled by the Court, theſe Caſes then remain in their full Force; and I will aſk in what Manner they may be ſaid not to be applicable to the Principle we are contending for, that in a Criminal Court Caſes of this Sort ought not to be gone into? Will it be ſaid

that this being a Proſecution under a ſpecial Act of Parliament, the Crime conſiſts in having married Two Perſons, that the Marriage muſt neceſſarily come under the Conſideration of that Court which is to determine? And they cannot by the Act of Parliament itſelf acquire an original Juriſdiction to enquire into the Right of Marriage. Does not it apply exactly as ſtrong to the Caſe I have now alluded to of forging a Will? for it is by expreſs Act of Parliament made a Felony of Death to forge a Will; and it may as well be argued from hence, that every Criminal Court has by that Act acquired an original Juriſdiction as to Wills. It cannot be argued a Moment, that a Criminal Court has original Juriſdiction of Marriage. I do not ſay, when it has not been determined before, but that the Court muſt neceſſarily enquire into the Fact; but that it cannot originally entertain ſuch a Queſtion. Now there cannot be a Caſe ſtated wherein a Queſtion was between the Parties upon the Validity of their Marriage and upon their State of Man and Wife, to ſhew that it can be determined by a Criminal Court: If it cannot, I conceive clearly, it cannot be ſaid to have original Juriſdiction upon the Point the Fraud and Colluſion; which, for the Reaſon that has been given, it was thought proper to mention, leſt it ſhould be made Uſe of upon the other Side. It will be ſaid perhaps, that there are many Inſtances where Parties trying to avail themſelves of a Judgment, or the Sentence of another Court, of the adverſe Parties being allowed to ſhew that thoſe Sentences were obtained colluſively: This Diſtinction I conceive has been made. If any Court ever is permitted to enquire into the Queſtion, it muſt be a Court having concurrent Juriſdiction; and then your Lordſhips will ſee the Queſtion upon every different Grounds, becauſe a Court having concurrent Juriſdiction has alſo the Opportunities, all the Methods of enquiring into the original Queſtion: They being competent to determine the original Point, it makes no conſiderable Difference whether it comes before them at firſt, or whether it has before been determined by another Court. It will not be contended, I conceive, that a Criminal Court has any concurrent Juriſdiction with the Eccleſiaſtical Court; it clearly cannot be ſo; it can never entertain the abſtract Queſtion between Parties, whether they are Man and Wife or no; the only Way it can be taken up is incidentally; and if the Authorities are good to ſhew, that where an incidental Queſtion ariſes, if it has been determined by a Court having original Juriſdiction, it ought to be concluſive; that will apply to the Caſe now before the Court. For theſe Reaſons, and for thoſe that have been more weightily argued by the Gentlemen who have gone before me, I hope your Lordſhips will not think proper to recede from the eſtabliſhed and legal Principles, or make a Precedent on this Occaſion; but if whatever has been, was upon the Strength of former Determinations, and if there is good Ground in Law to ſay that this Sentence ought to be concluſive to the Point to which it is now offered, I truſt your Lordſhips will be of Opinion that the Proſecution ought not to be permitted to go into any Evidence.

Doctor Wynne.

Notwithſtanding there has been ſo much and ſo ably ſaid upon this Queſtion, I hope that the Duty I owe to the noble Perſon at your Lordſhips Bar, will plead my Excuſe for offering a few Words upon the ſame Side, in Support of the Sentence of the Eccleſiaſtical Court, of the Effect with a View to which it is now produced before your Lordſhips.

My Lords, The Ducheſs of *Kingſton* is now upon her Trial, upon an Indictment found againſt her grounded on Statute 1 *Ja.* cap. 11, for that being the Wife of *Auguſtus John Hervey*, ſhe married the Duke of *Kingſton*, the ſaid *Auguſtus John Hervey* her former Huſband being then alive. The Foundation of this whole Proceeding therefore is a Marriage alledged in the Indictment to have been had between the Ducheſs of *Kingſton*, at that Time Mrs. *Elizabeth Chudleigh*, and Mr. *Auguſtus Hervey*.

That Marriage, my Lords, is the only Fact that can make any Criminality in the preſent Caſe; and if it ſhall appear to your Lordſhips a Fact, which has been already enquired into and decided upon; that it has been put in Iſſue in that Court which alone could properly take Cognizance of it; that That Court has pronounced its Sentence againſt the Marriage then put in Iſſue, or any Matrimonial Contract between Mr. *Hervey* and Mrs. *Chudleigh*, who were the Parties to that Suit, and that this Sentence ſtill remains in Force, it is ſubmitted to your Lordſhips to be impoſſible that thoſe who are proſecuting this Indictment againſt her Grace can be allowed to go into an Examination of Witneſſes upon that Marriage; it being a Fact now decided by the legal Sentence of a proper Court, and conſequently not the Subject of that Kind of Evidence which the Proſecutors are, we preſume, endeavouring to offer to your Lordſhips upon it, as if it had been a Queſtion upon which no Sentence had ever been given.

My

My Lords, The Sentence, upon which we rely, was paſſed in the Month of *February* 1769, and it recites all the Proceedings had in that Cauſe prior to the Sentence, and which are ſufficient, as we apprehend, to found that Effect which we contend it ought to have before your Lordſhips. The Sentence recites, that a Suit had been brought by the Ducheſs of *Kingſton* againſt Mr. *Hervey* for boaſting that he was her Huſband: That Mr. *Hervey* appeared in that Cauſe; that he admitted and juſtified the Jactitation; and alledged, that he was well warranted in making ſuch Jactitation, for that he was actually married to the Lady: By that Means they were at Iſſue upon the Fact. The Sentence goes on to ſay, that he had entirely failed in the Proof of the Marriage, which he had pleaded and propounded; in conſequence of which the Court pronounces Mrs. *Chudleigh* to be entirely free from all Matrimonial Contract, and particularly with the ſaid Mr. *Hervey*, *ſo far as to us as yet appears*; and upon that goes on to admoniſh him to ceaſe from farther jactitating in that Behalf. The Queſtion now for your Lordſhips Conſideration therefore is, what is the Effect of that Sentence? and I contend, that in the Way in which this Cauſe was proceeded in, it is as deciſive, as abſolute a Sentence againſt the Marriage, as the Eccleſiaſtical Court has Power to give.

If the Party who is accuſed in ſuch a Suit does not juſtify the Jactitation by pleading a Marriage, it is otherwiſe; for in that Caſe, whether the Fact of Jactitation is admitted or denied, the Sentence is only upon the Jactitation, not upon the Marriage: If the Jactitation is admitted, and is not juſtified, the Party is admoniſhed to do ſo no more; if the Jactitation is denied, the only Queſtion before the Court is, did the Party jactitate or not? and if the Jactitation is proved, the Sentence is the ſame, *viz.* a Monition to ceaſe from doing ſo for the future. But if the Party cited confeſſes the Jactitation, and juſtifies it by pleading that he or ſhe was and is actually and lawfully married to the other Party who has brought the Suit, it is no longer a Cauſe of Jactitation, it is as much and as directly a Marriage Cauſe as a Cauſe of Nullity of Marriage, or a Cauſe for Reſtitution of Conjugal Rights. It is as abſolute and deciſive Proof of this, in my humble Apprehenſion, that if the Party cited in a Cauſe of Jactitation pleads and proves a Marriage, the Court does not in that Caſe diſmiſs, and ſay, the Party it is true jactitated, and had a Ground for jactitating, therefore we diſmiſs: No, the Court pronounces for the Marriage. And I take it to be moſt clear, that ſuch a Sentence having been pronounced in any Eccleſiaſtical Court, if the Party cited ſhould immediately pray Reſtitution of Conjugal Rights, the Court will grant its Monition grounded upon that Sentence, that the Parties who were proved to have been lawfully married, ſhould cohabit and perform the Duties of their Marriage. It will not I preſume be contended that any Court can deal ſo very unequal a Meaſure of Juſtice between Parties, as to ſay, if a Marriage is proved we will pronounce for it: And yet in a Cauſe of exactly the ſame Nature, if a Party pleads a Marriage, and fails in the Proof of it, we will not pronounce againſt it. The Suppoſition is abſurd and ſhocking to common Senſe; and it is impoſſible that ſuch a Cauſe as a Cauſe of Jactitation could ever have been in Uſe, if the Party who brought it might loſe his Cauſe, and be engaged in a Marriage he was deſirous to avoid, but could never obtain any Sentence againſt the Party jactitating, that would have any legal Effect. It is impoſſible, with great Deference to your Lordſhips, that ſuch Doctrine ſhould ever have obtained; but the Truth is directly the Reverſe, and in all Courts where theſe Sentences againſt a Marriage in a Cauſe of Jactitation have been produced, they have been allowed to be as deciſive as any Sentence in an Eccleſiaſtical Court in a Marriage Cauſe could be. In the Caſe of *Jones* and *Bow*, reported in *Carthew*, it is expreſly ſaid, that it was a Cauſe of Jactitation. In the Caſe of *Clewes* and *Bathurſt*, which has been mentioned to your Lordſhips, it was a Cauſe of Jactitation; and I rather rely upon that Caſe, becauſe it appears by the Report of it in the Book intitled Caſes in Lord *Hardwick*'s Time, P. 11: *Hil.* 7 *Geo.* II. that it was attended by as able a Civilian as any of his Time, Doctor *Lee*, afterwards Dean of the Arches: He argued in that Cauſe, that a Sentence againſt a Marriage in a Cauſe of Jactitation is an abſolute and deciſive Sentence. And it appears from the Report, that he quoted another Caſe, which was that of *Milliſent* and *Milliſent*; in which it had been ſo held in the Court of Delegates, which your Lordſhips know is a Court of Appeal in Eccleſiaſtical Cauſes, in which there are both Judges of the Common Law and Civilians. The Caſe which was laſt alluded to, and which was in the Prerogative Court, your Lordſhips will allow me to ſtate a little more fully, becauſe it will ſhew the Opinion of the great Judge who now preſides in that Court. It was upon the Right of Adminiſtration to one Mrs. *Gertrude Brown*: The Queſtion was between *Stephen Brown*, who alledged himſelf to be the Huſband, and the Lady Viſcounteſs *Mayo*, the Daughter of the Deceaſed by a former Huſband: The Marriage between *Brown* and Mrs. *Aylemore*, which was the Deceaſed's former Name, was

not denied; but Lady *Mayo* inſiſted, that at the Time of the Marriage with Mrs. *Aylemore*, Mr. *Brown* had another Wife at that Time living, whoſe Name was *Eleanor Cutts*. Mr. *Brown* to that replied, that he had brought a Cauſe of Jactitation in the Conſiſtory Court of *London* againſt Mrs. *Eleanor Cutts*, and that Sentence had been pronounced exactly as in the preſent Caſe, and that he was free of all Matrimonial Contracts with ſaid *Elizabeth Cutts*. Lady *Mayo* then offered an Allegation, in which ſhe pleaded, that the Sentence in ſuch Cauſe of Jactitation had been obtained by Colluſion, and annexed to that Allegation ſhe exhibited many Letters between *Stephen Brown* and *Elizabeth Cutts*, by which it appeared, that after the Date of the Sentence they had correſponded together; that he had acknowledged himſelf to be her Huſband in ſeveral of theſe Letters, but told her it would be exceedingly inconvenient to his Affairs, and entirely deſtroy his Claim to the Adminiſtration of Mrs. *Aylemore*, which was of ſome conſiderable Value to him, if his Marriage with Mrs. *Cutts* was known, and therefore deſired her to be ſilent, and not give him any further Trouble; that was the Effect of Lady *Mayo*'s Allegation. The Moment that Allegation was brought into Court, the Proctor for *Brown* deſired that the Proctor for Lady *Mayo* might be aſked, whether he confeſſed or denied the Subſcription of the Officer who authenticated the Copy of the Sentence given in the Cauſe of Jactitation? which being confeſſed, and the Sentence by that Means regularly proved, the Judge ſaid he could go no farther; he could not enquire upon what Grounds that Sentence was given, but would give a Time to the Party, if ſhe thought it for her Intereſt to apply to the Conſiſtory Court of *London*, and ſee whether that Sentence could be reverſed; but it was held, that ſo long as it remained in Force, it was deciſive upon the Queſtion of the Marriage, and abſolutely binding upon the Judge of the Prerogative Court.

This being the Caſe then, the Queſtion for your Lordſhips Conſideration now is, what Effect the Sentence given in the Conſiſtory Court of *London* in 1769, in the Cauſe of Jactitation of Marriage brought by the Ducheſs of *Kingſton*, then Mrs. *Elizabeth Chudleigh*, againſt Mr. *Hervey*, ſhould have in the preſent Cauſe before your Lordſhips? My Lords, it would be a very unpardonable Waſte of your Lordſhips Time, at this Hour of the Day, for me to take up a Moment of it in arguing, that Marriage is by the Law and Conſtitution of this Country of Eccleſiaſtical Cognizance: There cannot be a Doubt, that if there be any Impediment to the Marriage of Two People living together as Man and Wife, that if One of the Parties denies either the Fact or Validity of the Marriage, that if One of the Parties refuſes to perform the Duties of it by Cohabitation, that if One of the Parties treats the other with intolerable Severity, that if a Perſon boaſts of a Marriage which he cannot juſtify, or if ſome Kind of Contract or Solemnity paſſed between Parties which may occaſion a Doubt whether it amounts to a lawful Marriage or not; in every one of theſe Caſes the Eccleſiaſtical Court has Cognizance to decide upon the Queſtions that ariſe, and it is a Denial of Juſtice to refuſe it; and would be a juſt Ground of Appeal to a Superior Court.

It is true, that in ſome Caſes where a Marriage is brought not directly, but collaterally and conſequentially in Queſtion, as where it is a Queſtion of Legitimacy in order to make a Title to an Inheritance, it may originally commence in the Temporal Courts, and ſometimes is finally determined there, as in the Caſe of what is by Common Law called Special Baſtardy, that is, where there is no Doubt about the Marriage, but about the Priority or Poſteriority of the Birth of the Party, who is claiming the Inheritance to that Marriage; there, it being a mere Matter of Fact, whether the Perſon was born before Marriage or after, it is proper for the Jury to determine; and there is no need of the Interpoſition of the Eccleſiaſtical Court at all. So in other Caſes, where the Matter begins as a Queſtion upon an Inheritance: A Perſon makes a Claim to an Inheritance as being the lawful Son of *A.* and *B.* if the Parties to the Marriage or One of them be dead, the Application muſt be made originally in this Caſe to the Temporal Courts, and they will proceed in it, and will either determine it finally, or direct a Caſe to the Ordinary to certify upon the Marriage, according as they find it neceſſary to do; and according as any Queſtion ariſes upon the Legality of the Marriage or not: But even in this Caſe, which is merely a Queſtion upon a Right to an Inheritance, and not between Parties to a Marriage, but between Parties claiming under a Marriage, if One of them produces a Sentence formerly given upon the Marriage by the Eccleſiaſtical Court in the Life-time of the Parties to ſuch Marriage, the Moment that Sentence is produced, the Court of Common Law is eſtopped; and notwithſtanding the original Parties to that Sentence are dead, the Parties to the Suit upon the Inheritance muſt ſtill have recourſe to the Eccleſiaſtical Court to repeal the Sentence formerly given upon the Marriage before the Temporal Court can proceed a Step further: And if this Sentence of the Eccleſiaſtical Court is not ſet aſide, the Judgment of the Tem-

poral Court muſt be agreeable to that Sentence. The Caſes of *Bunting* and *Leppingwell*, and *Kenn*'s Caſe, reported by Lord *Coke*, are deciſive upon this Point: And it would, I ſhould conceive, in framing your Opinion upon the Credit due to the Doctrine laid down in theſe Caſes, be worth One Moment's Conſideration at what Time the lateſt of them was determined: *Kenn*'s Caſe was in the Fifth of King *James* the Firſt. Your Lordſhips know extremely well, that was a Time when the different Juriſdictions of the Temporal and Eccleſiaſtical Courts were not ſo completely ſettled, or at leaſt that Settlement was not ſo completely acquieſced in on the Part of the Eccleſiaſtical Courts then, as it has been ſince: They did frequently deſire to arrogate to themſelves more Juriſdiction than the Temporal Courts were willing to allow; and the Conſequence of that was, they were very frequently withſtood: This produced a Complaint to the Privy Council in the 3d of King *James* I. when Archbiſhop *Bancroft*, in the Name of the whole Clergy, exhibited a Set of Articles againſt the Judges of the Realm (as Lord *Coke* expreſſes it, 2d Inſt. 601.) intitled, "Certain Articles of Abuſes which are deſired to be reformed in granting Prohibitions:" Theſe Articles were delivered to the Judges, who in the 4th of King *James* made their Reply to them, in which they juſtified the Proceedings objected to by the Archbiſhop in every Particular, and that not without ſome conſiderable Degree of Warmth and Reſentment. Now, with great Deference to your Lordſhips, I ſhould conceive, that a Reſolution ſolemnly and unanimouſly made by the Two Chief Juſtices and Five other Judges of the Common Law in the very next Year after ſuch a Diſpute as this had been carried on between the Two Juriſdictions, cannot well be ſuſpected of Partiality to the Eccleſiaſtical Court: And Lord Chief Juſtice *Coke*, who was One of the Court, was not a Judge that would at any Time have ſtood up for their Encroachments; and therefore there is not the leaſt Room to apprehend, that there was any undue or improper Degree of Authority attributed by that Reſolution of the Judges to Sentences of the Eccleſiaſtical Courts.

My Lords, This Caſe of *Kenn*, which is reported 7 *Coke*, 43, has been already opened to your Lordſhips; but it being in my Apprehenſion extremely material in this Cauſe, containing the whole Learning that is to be met with in the Book upon the Subject, and going the whole Length, as I humbly ſubmit to your Lordſhips it does, that it is our Buſineſs to contend for in Behalf of the noble Perſon at the Bar, your Lordſhips will not perhaps think it miſpent Time in me to ſtate it more particularly. It was a Caſe in the Court of Wards, in which *Thomas Robertſon* and *Elizabeth* his Wife were Plaintiffs, and *Florence* Lady *Stallenge* Defendant: The Caſe was, that *Chriſtopher Kenn de facto* took to Wife *Elizabeth Stowell*, and had Iſſue by her *Martha*; ſoon after this there appears to have been a Suit brought in the Court of Audience, in which the Judgment given was in theſe Words: *Prætenſum contractum et Matrimonium inter* Chr. Kenn *et* Eliz. Stowel *in minore ætate eorundem aut eorum alterius habitum fuiſſe: Eoſdemque* Chr. *et* Eliz. *tam Tempore ſolemnizationis dicti Matrimonii quam etiam continuo poſtea, eidem Matrimonio diſſenſiſſe, ac eo prætextu hujuſmodi Matrimonium irritum et invalidum fuiſſe: Necnon antedictos* Chr. Kenn *et* Eliz. Stowel *ab dicto Matrimonio ſeparandos et divorciandos fore pronunciamus, eoſque ſeparamus et divorciamus, iiſdemque* Chr. *et* Eliz. *Libertatem ad alia vota convolandi concedimus per hanc Sententiam noſtram definitivam.*

My Lords, After this *Kenn* married another Wife, *Elizabeth Beckwith*; and after this it appears that *Elizabeth Beckwith* brought a Suit before the Commiſſioners Eccleſiaſtical to enquire again into the Validity of the Marriage between *Chriſtopher Kenn* and *Elizabeth Stowell*: There that Marriage was again pronounced againſt, and the Marriage of *Chriſtopher Kenn* with *Elizabeth Beckwith* was affirmed; then *Elizabeth Beckwith* died, and *Chriſtopher Kenn* married *Florence*, by whom he had Iſſue *Elizabeth*, and then died: At laſt the Queſtion came on between the Iſſue of *Chriſtopher Kenn* by *Florence*, and *Martha* the Iſſue of ſaid *Chriſtopher Kenn* by his Firſt Wife *Elizabeth Stowell*, who deſired ſhe might be permitted to aver againſt the Sentence formerly given againſt the Marriage between *Chriſtopher Kenn* and *Elizabeth Stowell*, declaring that ſhe could prove, that the Whole was founded on an abſolute Falſehood; and that thoſe Parties, who are declared by the Sentence of the Eccleſiaſtical Court to have been married in their Minority, and to have diſſented to the Marriage in the Moment it was ſolemnized, and ever after, had cohabited as Huſband and Wife for Ten Years, and had Iſſue *Martha*, the Party before the Court: This the ſaid Party averred, and undertook to prove in the Court of Wards, in order to avoid the Effect of the Sentence of the Eccleſiaſtical Court againſt the Marriage between her Father and Mother. But it was reſolved by all the Juſtices and Barons, that the ſaid Sentence ſhould conclude as long as it remained in Force: And in Anſwer to the Averment that the Sentence was founded upon falſe Facts, they ſaid, that though the Eccleſiaſtical Judge ſheweth the Cauſe of his Sentence, yet foraſmuch as he is Judge of the original Matter, the Loyalty of Matrimony, we ſhall

never examine the Cauſe, whether it were true or not; for of Things, the Cognizance whereof belongeth to the Eccleſiaſtical Court, we muſt give Credit to their Sentences, as they give to the Judgments in our Courts. In that ſame Caſe it was, that Lord *Coke* quoted the Caſe of *Corbett*, and There there had been no Sentence in the Eccleſiaſtical Court; that originally began upon the Queſtion of a Right to an Inheritance; and the Party who claimed the Inheritance was adviſed to bring a Suit in the Eccleſiaſtical Court then againſt a Woman who jactitated, as he ſaid, of an undue Marriage with his elder Brother: The Party againſt whom this Suit was brought in the Eccleſiaſtical Court applied for a Prohibition, and the Temporal Court granted it; for they ſaid, there is no Sentence of the Eccleſiaſtical Court in this Caſe for you to reverſe, no Sentence has been given; therefore we will enquire, as far as we ſee we can do without interfering in Matters of mere Eccleſiaſtical Cognizance, reſpecting the Loyalty of the Marriage; and we may direct the Ordinary to certify hereafter, if there is a Neceſſity for it; but there is no Need to apply to the Eccleſiaſtical Court in the preſent State of the Caſe.

In exact Conformity to this Principle it was reſolved by the Judges of the Common Law in the Caſe of *Bunting* and *Leppingwell*, 4th *Coke*, 29, foraſmuch as the Cognizance of the Right of Marriage doth belong to the Eccleſiaſtical Court, and the ſame Court hath given Sentence in this Caſe, the Judges of our Law ought (although it be againſt the Reaſon of our Law) to give Faith and Credit to their Proceedings and Sentences, and ſo always have the Judges of our Law done: And ſo it was reſolved, that the Plaintiff was Legitimate and no Baſtard.

This is the Light in which the Sentences of the Eccleſiaſtical Courts, given in Matters properly within their Cognizance, were conſidered in the Courts of Common Law at the Time when the Caſes I have juſt referred to were determined; and there is ſuch a Train of Caſes exactly conformable to them down to very modern Times, which have been already quoted, and therefore I will not trouble your Lordſhips with repeating them, that I cannot help thinking it muſt be looked upon as a Point abſolutely ſettled and at reſt.

But, my Lords, not to reſt the Matter merely upon Authority, however ſtrong, if your Lordſhips conſider the Grounds upon which theſe Determinations were made, I apprehend they will be founded, not only in Juſtice, but in abſolute Neceſſity; and that the Confuſion would have been ſo infinitely great, if, admitting different Courts to take Cognizance of different Matters, their Sentences ſhould not be allowed to take Effect when they were given, but the Matter might be examined over again, and a different Sentence given in another Court, the former Sentence remaining unrepealed, that there would be no Poſſibility of enduring ſuch a Practice. Conſider for a Moment what Effect it would have: Suppoſe a Man to have brought a Suit for Jactitation of Marriage againſt a Woman in the proper Eccleſiaſtical Court; that ſhe ſhould plead her Marriage by way of Juſtification, and obtain a Sentence for it; the Man dies inteſtate after that, and ſhe applies to the Prerogative Court for an Adminiſtration as the Widow: The next of Kin of the Deceaſed appears there, and denies her to be the lawful Widow; in Proof of which ſhe produces the Sentence: Is the Prerogative Court to give Credit to this Sentence or not? If it is to give Credit to it, (as it does daily) the Reaſon is, becauſe it binds univerſally as long as it is in Force; for, though they are both Eccleſiaſtical Courts, there is no more Privity between the Prerogative Court and the Conſiſtory Court of any Dioceſe, than between the Prerogative and the Court of King's Bench: The Prerogative Court has the mere Cognizance over Probate and Adminiſtration; and therefore if univerſal Credit is not due to the Sentence of the Court which pronounced for the Validity of the Marriage, the Prerogative Court muſt in the Caſe ſuppoſed go into the Queſtion over again, whether the Party deceaſed and the Party claiming to be his Widow were married or not married. The Prerogative Court is an Eccleſiaſtical Court, and proceeds upon the ſame Rules, ſo far as they are applicable; it proceeds in the ſame Manner by Allegation and by written Evidence; the Judge is a Perſon bred in the ſame Profeſſion; and the Practiſers are the ſame with thoſe that practiſe in the Conſiſtory Court of *London*; and therefore there is a Probability that the Prerogative Court in this Caſe might agree with the Judge of the Conſiſtory in Opinion that the Marriage was a good one, and conſequently decree the Adminiſtration to the Party praying it as the Widow. What would be the Conſequence of that? why, the Party would have had Two Law Suits inſtead of One, and have got by them Two Pieces of Paper called Sentences, for her Marriage, and Letters of Adminiſtration, but ſhe would not be a Bit the nearer getting Poſſeſſion of the Deceaſed's Effects; for theſe ſhe muſt apply to a Court of Common Law; and there, according to this Doctrine, the Firſt Perſon ſhe is obliged to bring an Action againſt will be at Liberty to ſay, who are you? the Adminiſtratrix and Widow. No, I deny that: It is true you have obtained a Sentence for your Marriage and an Adminiſtration from the

Prerogative Court as the Widow; but thoſe Sentences were founded upon falſe Facts; therefore I object to them, and deſire there may be a Third Suit, to have it enquired into in this Court, whether there was a real Marriage or not. Now, ſuppoſing that in this Third Suit a Jury ſhould be of a different Opinion from the Two former Courts, what would be the Conſequence? why, that the Party who brought a Suit for a Debt would be non-ſuited: So that here would be a legal Adminiſtration ſubſiſting (unleſs the Court in which the Action was brought could repeal it and grant a new one, a Power which I believe no Temporal Court has ever yet exerciſed) but the Hands of the Adminiſtrator would be abſolutely tied up, the Effects could never be adminiſtered, the Debts of the Teſtator could never be called in, the Eſtate could never be diſtributed. Your Lordſhips ſee plainly that the Confuſion would be ſo extreme, if this Doctrine was to prevail, that no Error in a Sentence, however apparent, nor any Inconvenience ariſing from it to particular Perſons, however great, can be a ſufficient Cauſe for any Court to examine into the Merits of a Sentence given in a Matter of which itſelf has no legal Cognizance; and that there is the utmoſt Wiſdom in thoſe Reſolutions which declare, that there is an implicit Credit due from all other Courts to the Sentences of Courts having the proper Juriſdiction over the Matter in which the Sentence has been pronounced.

My Lords, The Caſes that I have hitherto mentioned and alluded to have been all in Civil Cauſes: Will it be ſaid, that the Queſtion now before your Lordſhips, being in a Criminal Cauſe, that varies the Caſe; and that although a Sentence of the Eccleſiaſtical Court would be binding and concluſive Evidence in a Civil Cauſe, yet in a Criminal Cauſe it would not have the ſame Effect? My Lords, the ſame Effect I can very readily agree that, according to my poor Notions of Law and Juſtice, it would not have; but I ſhould think it would have Ten Times greater; and I cannot conceive it poſſible, that it can be held in any Caſe, or in any Country in the World, that a Sentence, which would be held to be concluſive Evidence to avoid a Civil Demand againſt a Perſon, would not be held to be concluſive Evidence and Defence againſt a Criminal Proſecution: I cannot conceive that to be poſſible. *In pænalibus Cauſis benignius interpretandum eſt*, is a Maxim of univerſal Law. Undoubtedly it is the Buſineſs of all Criminal Judicatures to enquire ſtrictly into Crimes; to puniſh thoſe Acts which the Law has made criminal, and which are legally proved; but Courts of Law do not ſtrain Points in order to make Crimes, and inflict Puniſhments; it never was ſo contended: And I do conceive that many Inſtances might be enumerated by thoſe who are converſant in the Practice of the Criminal Law, which I am not in the leaſt, in which Parties proſecuted are indulged with peculiar Privileges; I believe that they are not bound by their Firſt Plea: If a Party has been ill adviſed in his Plea, he is bound down by that in a Civil Cauſe; but in Criminal Proſecutions the Priſoner may plead over and over again, and is allowed to avail himſelf of every Nicety in the Law to avoid Conviction.

Upon theſe Grounds therefore I hope it will appear to your Lordſhips to be moſt clear, that the Sentence of the Eccleſiaſtical Court always has been eſteemed and muſt be allowed to be final, to be the only Evidence that can be received concerning the Fact upon which it has been pronounced, and that the Fact is no longer the legal Object of Enquiry by any other Court. I do apprehend this to be ſo clearly and fully eſtabliſhed, that I can ſcarce conceive that the Gentlemen will deny it; but I apprehend and do expect that they will endeavour to find a Diſtinction; and they will ſay, though we ſhould admit your Rule, that the Sentence of an Eccleſiaſtical Court is binding ſo long as it ſubſiſts in general, yet if that Sentence was obtained by Colluſion and Fraud, it is otherwiſe; and if it can be proved to have been ſo obtained, it will immediately loſe its Effect. I expect we ſhall be ſo told; and I do admit, that to maintain our preſent Point, which is, that the Sentence is concluſive Evidence, we muſt ſay that it is a Rule without any Exception; we muſt ſay, that Colluſion in obtaining the Sentence would not give your Lordſhips any Juriſdiction to enquire into the Fact: And I do, with great Submiſſion, contend before your Lordſhips, that no Court which has not an abſolute and an entire Juriſdiction over a Fact, as much as the former Court had, can take Cognizance of a Matter that has been already decided upon in that former Court, upon a Suggeſtion or even Proof that Colluſion was uſed in obtaining the former Sentence. I may, and I am afraid I ſhall, talk very ignorantly reſpecting thoſe Caſes in which the Courts of Common Law take Cognizance of Matters which have been already decided upon by other Courts, upon Proof that the Deciſion was obtained by Fraud and Colluſion of the Parties at that Time before the Court. I own I am by no Means Maſter of that Subject; but I apprehend they are only in ſuch Caſes where each Court, ſuppoſe the Court of King's Bench and Common Pleas or any other, has an entire Concurrence of Juriſdiction; where there was an Option in the Parties to commence the Suit originally either in one Court or the other, and where

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the Effect of the Sentence of the Two Courts would be perfectly equal. In ſuch a Caſe, if after Sentence given in One of thoſe Courts Application ſhould be made to the other to rehear the Matter, on Proof that the former Deciſion was not fairly obtained, this might be a juſt Ground for the Court to which Proof of the Fraud is offered, to ſay, we will hear the Matter over again, which we had a Right to have heard as well as the other Court had, had it not been that the Cauſe was commenced with them: But I apprehend no Court can do this, the Sentence of which, when it is given, will not have the ſame legal Effect to the full as the Sentence of the former Court. Nor can it be ſaid that this Court, High and Auguſt as it is, or any other Court of Criminal Juriſdiction, can give a Sentence upon a Marriage, which will have all the Effects that the Sentence of the Eccleſiaſtical Court will have. Strip the Queſtion of its Circumſtances, and let it be aſked ſimply, has the Houſe of Lords a Power to try the Validity of a Marriage? Every Body will ſay at once, it has not. Allow me to conſider what would be the Conſequence if your Lordſhips were to take Cognizance of this Matter, and were, notwithſtanding the Sentence of the Eccleſiaſtical Court, upon the Suggeſtion of Colluſion, or any other Suggeſtion, to ſay, we are not barred by it, we will go into it; and that the Party tried under ſuch Circumſtances ſhould be convicted of Polygamy; what would be the Conſequence of that? Would it ſet aſide the Second Marriage? I take it moſt clearly it would not. Suppoſe that after the Wife had been convicted of Polygamy for marrying *B.* in the Life-time of *A.* her former Huſband (a Sentence againſt her Marriage with *A.* having Firſt been obtained in the Eccleſiaſtical Court) ſhe ſhould by any Means become entitled to a Fortune, by Legitimacy or otherwiſe, would not *B.* have a Right to demand the Legacy, or any other Effects that came to the Woman ſubſequent to the Conviction? I ſubmit to your Lordſhips, he certainly would. Suppoſe *B.* to die inteſtate, might not the Wife, notwithſtanding ſuch a Conviction as this, pray the Adminiſtration to his Effects? And if her Intereſt as Widow was denied, as having been the Wife of *A.* at the Time ſhe married *B.* and ſhe in Reply to this ſhould produce the Sentence in the Eccleſiaſtical Court againſt her Marriage with *A.* bearing Date prior to her Marriage with *B.* the Court could not refuſe to grant Adminiſtration to her. Suppoſe that after the Conviction the Parties to the Second Marriage ſhould continue to cohabit, and ſhould have Children, would not they be entitled to the Inheritance as the legitimate Iſſue of the Second Marriage? I take it, that under the Authority of the Caſes of *Bunting* and *Leppingwell*, *Kenn*, and the Reſt that have been ſince determined conformably to thoſe Caſes, there cannot be a Doubt that they would, if a Queſtion ſhould ariſe upon the Right to the Inheritance in a Court of Common Law, ſo long as the Eccleſiaſtical Sentence againſt the Firſt Marriage remained in Force: In ſhort, the Conviction would have no Operation at all upon any Civil Effect of the Second Marriage. The Conſequence therefore of proceeding to convict for Polygamy for a Second Marriage, in a Caſe where there had been a Sentence of the proper Eccleſiaſtical Court againſt the Firſt, would be, that a Woman who had been convicted of Felony for marrying, might under that Criminal Act (as it would then be pronounced to be) derive to herſelf all the Privileges and Advantages that accrue to a Wife in the Fortune of her Huſband by a lawful Marriage, and convey a Title to her Iſſue to the greateſt Honours and Eſtate in the Kingdom. Theſe are ſuch glaring Contradictions and Abſurdities, as I ſhould with great Deference apprehend, that neither your Lordſhips, nor any other Court of Juſtice would give Occaſion to, without the utmoſt Reluctance. There is a Caſe or Two which have not yet been mentioned, and which appear to me to be extremely material, to ſhew the extraordinary and unuſual Steps that have been ſometimes taken by Courts, and in Caſes extremely ſimilar to the preſent, to avoid a Contrariety of Sentences of Courts having different and diſtinct Juriſdiction. In the Caſe of *Boyle* and *Boyle*, in the King's Bench in 1687, reported 3d *Mod.* 164. A Libel was admitted in the Spiritual Court againſt a Woman *Cauſa Jactitationis Maritagii*, the Woman prayed a Prohibition to the Eccleſiaſtical Court; and the Suggeſtion was, that this Perſon, who now libelled againſt her in a Cauſe of Jactitation, had been indicted at the Seſſions in the *Old Bailey* for marrying her, he having a Wife then living; that he was thereupon convicted, and had Judgment to be burnt in the Hand; that therefore they had no Right to proceed, and therefore a Prohibition was prayed. Serjeant *Levintz* in that Caſe moved for a Conſultation, becauſe no Court but the Eccleſiaſtical Court can examine the Marriage: Upon the contrary it was ſaid, that if a Prohibition ſhould not go, then the Authority of theſe Two Courts would interfere, which might be a Thing of ill Conſequence: That if the Lawfulneſs of this Marriage had been Firſt tried in the Court Chriſtian, the other Court at the *Old Bailey* would have given Credit to their Sentence, and upon this Ground and this Principle merely, that there might be a Contrariety of Sentences, which would be miſchievous. The Court went certainly a great Way, for it prohibited the Eccleſiaſtical Court from

proceeding in a Marriage Cauſe *inter vivos*, of which it has the cleareſt and moſt uncontroverted Juriſdiction.

My Lords, Another Caſe was that of *Furſman* and *Furſman*, which began in the Conſiſtory Court of *Exeter*: It was a Cauſe of Reſtitution of Conjugal Rights brought by the Woman; the Libel was admitted; and then there was an Appeal to the Court of Arches; the Judge pronounced for the Appeal, and was proceeding upon the Merits of the Cauſe; but upon the 4th of *November* 1727, he was ſerved with a Prohibition; and the Ground for obtaining this Prohibition was, that *Sarah Furſman*, pretending to be the lawful Wife of the ſaid *Furſman*, had indicted him for Bigamy in marrying another Wife, and failed in Proof of her own Marriage; whereupon the ſaid *Furſman* was acquitted; and therefore it was ſaid the Eccleſiaſtical Court ſhould not proceed. Now, my Lords, if a prior Judgment given by a Court, in a Matter in which it can have only an incidental partial Juriſdiction, is a ſufficient Cauſe for ſtopping all ſubſequent Proceeding in the ſame Caſe, even in the Court which has the entire ordinary Juriſdiction over the Queſtion, on account of the ill Conſequence that would enſue from the Interference of the Authority of the Two Courts; ſurely, by all Parity of Reaſoning, in a Caſe where it appears that the Court, which the Law and Conſtitution have entruſted with the entire Juriſdiction over the Matter in Queſtion, has already taken Cognizance of it and pronounced its Sentence, the Court of incidental Juriſdiction will give Credit to ſuch Sentence, and conform its own Sentence to it.

If the ill Conſequences ariſing from claſhing and contradictory Judgments of different Courts may be allowed to have any Influence upon your Lordſhips Judgment in this Matter, there is no Need to rack the Invention for Circumſtances that might happen; the Caſe before your Lordſhips need but be plainly ſtated, to ſhew thoſe Inconveniencies in the ſtrongeſt Light. The Sentence of the Eccleſiaſtical Court pronouncing and declaring the noble Priſoner to be free from all Matrimonial Contracts with Mr. *Hervey*, was given in *February* 1769: Soon after ſhe married the Duke of *Kingſton* under the Diſpenſation that is uſually granted for the Marriage of Perſons of that Rank. Under this Marriage the Duke and Ducheſs cohabited between Four and Five Years as Huſband and Wife, at the Expiration of which the Duke of *Kingſton* died, having firſt made his Will, by which he gave the moſt affectionate and moſt honourable Teſtimony of his conſidering her as his Wife. At laſt in *July* 1775, comes a Bill of Indictment, which is to ſet the Sentence of the Eccleſiaſtical Court entirely at nought, and to brand this open and ſolemn Marriage, confirmed by a Cohabitation and Reputation of ſo many Years, with the Name of a Felony.

My Lords, If this Indictment ſhould be proceeded upon, and the Fact of the Firſt Marriage found differently from what appeared to the Chancellor of *London* at the Time of pronouncing his Sentence upon it, the Confuſion, the Scandal (I think I may venture to call it) that would ariſe from the Contrariety of the Two Sentences that would then be pronounced, and both ſtill in Force, would be ſuch, that I cannot conceive that any Court of Juſtice would hazard it, upon any Suggeſtion or Apprehenſion of Error in the former Sentence, or Fraud in obtaining it, and which was irremediable by any other Means, or any other the moſt ſtriking or plauſible Argument that could be urged to induce them to it. But the Plea of the Neceſſity of doing an extraordinary Act to ſet aſide an improper Sentence, or the Effect of ſuch a Sentence, is certainly leſs applicable to the Eccleſiaſtical Court, than to any other Court known in this Kingdom; and leaſt of all is it applicable to their Proceedings in Marriage Cauſes. There is a Courſe of Appeal, in the Eccleſiaſtical Courts, a Deliberation in their Proceedings, that is unknown to any Court in this Kingdom; from the Archidiaconal Court (if the Cauſe be originally inſtituted there) to the Conſiſtory of the Dioceſe; from thence to the Metropolitical Court, which is the Court of Arches; from thence to the King in his Court of Chancery; from which a Commiſſion of Delegates to hear Appeals, iſſues *ex debito juſtitiæ*: In every One of theſe Courts the Parties are not bound down to what has been given in Evidence in the Court below: It is not merely Error in Law, but Error in Fact likewiſe may be corrected upon Appeal in the Eccleſiaſtical Court; and if there are any Facts material to the Point in Iſſue, that have not been pleaded and examined to in the inferior Court, they may be pleaded and given in Evidence in the Court of Appeal; and ſo down to the laſt Court. Beſides this, in every One of theſe Courts it is not a Matter confined to the Two Parties that inſtitute the Suit, and therefore may carry it on colluſively; for in any Period of the Cauſe a Third Perſon, that has any Intereſt in the Matter in Queſtion, if he ſees that the Two original Parties are colluding, or that One of them is negligent, or if he has any other Reaſon to be diſſatisfied with the Manner in which the Buſineſs is conducted, he may intervene for his Intereſt, and the Court muſt *ex debito juſtitiæ* admit him to do ſo; he may give in a Plea, if he intervenes before the Cauſe is concluded; he

may examine his own Witneſſes, and act in all Reſpects as a Party in the Cauſe. What poſſible human Means of providing againſt Colluſion and Surprize is omitted out of this Method of Proceeding! But, my Lords, even this is not all; for when the Cauſe has run this great Length, Application may be made to his Majeſty in Council, who, if he is adviſed that there is a Ground for it, has a Power *ex gratia* to grant a Commiſſion to review the whole Matter over again. From this View of the Method of Proceeding in Eccleſiaſtical Courts, I apprehend it will appear to your Lordſhips, that they are not ſo ill provided with Means either to avoid, or to reform Errors in their Judgments, as to ſtand in need of the extraordinary Interpoſition of other Courts, in any Matters that are properly within their Juriſdiction; but leaſt of all is this neceſſary in a Marriage Cauſe, for a Marriage Cauſe is never at an End: Let the Cauſe have been argued ever ſo often, let it have been ſifted with the moſt ſcrupulous Exactneſs and Attention, let there have been One or more Appeals, let every Step have been taken that can be taken to give a final and concluſive Judgment, ſtill the ſame Party may come before the Court, and ſay, the Court has been impoſed upon; I deſire this Matter may be examined over again: The Court, upon ſuch Application, would and muſt take Cognizance of it.

I will trouble your Lordſhips with quoting but One Authority for this, which is that of *Sanchez* in his Treatiſe de Matrimonio, Lib. 7. Diſp. 100. C. 1. who lays it down in theſe poſitive and explicit Terms: "*Id in Matrimonio ſpeciale eſt, ut Sententia in Conjugali Cauſa lata, quacunque circumſpectione præmiſſa, ſive bis ab ea provocatum fuerit confirmataque ſit, ſive lapſus terminus ad appellandum ſit, nunquam tranſeat in rem Judicatam, ac proinde non ita efficacem auctoritatem ſortiatur, quin retractanda ſit, quoties compertum fuerit eam errore quodam latam fuiſſe.*" And the Reaſon aſſigned for making this material and ſingular Diſtinction between Marriage Cauſes and all other Cauſes is, that in general the Conſent of the Party who does not appeal from a Sentence which is given againſt him, gives Force and Authority to the Sentence, though there might otherwiſe be a Ground for him to complain of it. But, ſays the Author before quoted, "*Sententia per Errorem lata in Cauſa Conjugali, tranſiens in rem Judicatam, foveret peccatum, ſeparando veros conjuges, vel uniendo eos qui tales eſſe nequeunt: At nullum vinculum quantulumcunque multiplicatum, poteſt firmare actum ex quo peccatum conſurgit.*"

The ſame Doctrine is laid down in a Multitude of other Writers upon the Canon Law, of which there are Waggon Loads; but they are unanimous in eſtabliſhing the Maxim, "*Sententiam in Cauſa Matrimoniali nunquam tranſiere in rem Judicatam*;" which I am ſure your Lordſhips will not hear denied or diſputed by the other Side.

From hence it will appear to your Lordſhips, how little Ground there is for that Notion which ſeems to have got Abroad, that the Proceedings of the Eccleſiaſtical Courts in Cauſes of Jactitation, or any other Cauſes, are ſuch as tend to looſen the Bonds of Matrimony (which both in a Civil and Religious Light without Doubt is the moſt eſſential Bond of Society) and give Parties an Opportunity of diſſolving it at their Pleaſure. The Court in in theſe, as in all other Caſes, muſt determine *ſecundum Allegata et Probata*, according to the Evidence before it: But where is the Encouragement given to Parties to collude, or what Security can they have under a Sentence obtained by Fraud, when that Fraud may at any future Time be detected, by bringing forward that Evidence which was before withheld, and upon Proof that the former Sentence was erroneous, another of a direct contrary Tendency will be given?

My Lords, The Marriage, which is the only Fact in Diſpute in the preſent Caſe, has many Years ago been put in Iſſue in the proper Manner in the proper Court, and a Sentence given againſt it as deciſive as any that Court can give in a Marriage Cauſe: Upon Truſt and Confidence in that Sentence it was, that the Act was done for which the noble Priſoner is now accuſed before your Lordſhips; the Sentence is produced, remaining in full Force; and for the Reaſons that have been urged, we humbly hope your Lordſhips will be of Opinion, that it is the only legal Evidence that can now be given reſpecting the Fact upon which the Accuſation is founded, and that your Lordſhips will therefore receive it in Bar of any other.

Then the Lord High Steward returned back to the Chair.

Lord Preſident of the Council. My Lords, I move your Lordſhips to adjourn to the Chamber of Parliament.

Lords. Ay, ay.

Lord High Steward. This Houſe is adjourned to the Chamber of Parliament.

The Lords and others returned to the Chamber of Parliament in the ſame Order they came down, except the Lord High Steward, who walked after his Royal Highneſs the Duke of *Cumberland*; and, the Houſe being thus reſumed, Reſolved to proceed further in the Trial of *Elizabeth* Ducheſs Dowager of *Kingſton*, in *Weſtminſter-Hall*, To-morrow at Ten of the Clock in the Morning.

TUESDAY, April 16. *The Second Day.*

THE Lords and others came from the Chamber of Parliament in the ſame Order as on *Monday*, except the Lord High Steward, who walked after his Royal Highneſs the Duke of *Cumberland*, and the Peers were there ſeated, and the Lord High Steward in his Chair.

Lord High Steward. My Lords, The Houſe is reſumed. Is it your Lordſhips Pleaſure that the Judges may be covered?

Lords. Ay, ay.

Then the Serjeant at Arms made Proclamation for Silence as uſual; and the Ducheſs of *Kingſton* being conducted to the Bar,

Lord High Steward. Mr. Attorney General, you may proceed.

Mr. Attorney General.

MY Lords, I find myſelf engaged in a very ſingular Debate; upon a Point perfectly new in Experience, analogous to no known Rule of Proceeding in ſimilar Caſes, founded on no Principle, none at leaſt which has been ſtated.

The Priſoner, being arraigned upon an Indictment for Felony, pleaded Not Guilty; upon which Iſſue was joined. In this State of the Buſineſs ſhe hath moved your Lordſhips, that no Evidence ſhall be given or ſtated to prove that Guilt upon her, which ſhe hath denied and put in Iſſue.

The only Caſe cited in Support of ſo extraordinary a Motion, that of *Jones* and *Bow*, *Carth.* 225, bears no Relation or Proportion to it. In the Trial of an Ejectment, the Defendant, admitting the Plaintiff's Title to be otherwiſe clear, avoided it by a Sentence againſt the pretended Matrimony of his Mother with Sir *Robert Carr*; after which both Parties married with other Perſons; a Sentence, unimpeached in Form or Subſtance, againſt his own Mother, from whom he was to derive Title to his State; deciſive conſequently as a Fine with Non-claim, or any other perfect Bar; and ſubmitted to accordingly; for the Plaintiff was called, and did not appear. Here, if the Sentence ſhould ever come properly under Examination, it will appear to differ in all thoſe Reſpects.

In the mean Time, inſtead of defending, this Motion is only putting Queſtions to your Lordſhips, hypothetically, for Opinion and Advice how to order the Defence. If this Sentence be, as they argue it, a definitive and preclusive Objection to all Enquiry, the Priſoner ought to have pleaded it in Bar, and to have put the Proſecutor upon dealing with her Plea as he ſhould be adviſed; or ſhe may ſtill rely upon it in Evidence of Not Guilty. But without placing any ſuch Confidence in it themſelves, they call upon your Lordſhips to make it the Foundation of an Order to ſtop the Trial.

My Lords, To ſay that this is wholly unprecedented, goes a great Way to conclude againſt it. To ſay that ſuch a Rule would be inconſiſtent with the Plea, and repugnant to the Record as it now ſtands, ſeems deciſive. After putting herſelf for Trial upon God and your Lordſhips, ſhe beſeeches you not to hear her tried. But I ſhall not content myſelf with this Anſwer; becauſe, as your Lordſhips have thought proper to hear Counſel in Support of this extraordinary Motion, I am bound to ſuppoſe it a fit Subject for Argument, and to lay before your Lordſhips my Thoughts upon it as they occur.

Before I go into particular Topics, I cannot help obſerving, with ſome Aſtoniſhment, the general Ground which is given us to debate upon. Every Species and Colour of Guilt, within the Compaſs of the Indictment, is neceſſarily admitted. So much more prudent it is thought to leave the worſt to be imagined, than even to hear the actual State of her Offence. Your Lordſhips will therefore take the Crime to be proved in the broadeſt Extent of it, with every baſe and hateful Aggravation it may admit; the Firſt Marriage

ſolemnly

ſolemnly celebrated, perfectly conſummated; the Second wickedly brought about by practiſing a concerted Fraud upon a Court of Juſtice to obtain a colluſive Sentence againſt the Firſt; a Circumſtance of great Aggravation. When *Farr* and *Chadwick* defended a burglarious Breaking and Entering, under a Pretence of an Execution, upon a Judgment fraudulently obtained againſt the caſual Ejector, it was thought to aggravate their Crime, and they ſuffered accordingly. I allude to the Caſe in *Kelyng*, 43.

My Lords, I take the Ground ſo given me with this Reſerve, not that I wiſh to have her Crime implied, from the Conduct ſhe is adviſed to hold here, to all Purpoſes and Concluſions; but that the Neceſſity of the Argument obliges me to aſſume it, as plainly and diſtinctly confeſſed, while this Sentence is urged as an irrefragable Bar to the Trial, whatever may be the Degree of her Guilt, however ſuch a Sentence may have been obtained, and whether it tends to aggravate that Guilt, or to extenuate it. The Propoſition looks ſo enormous, that it requires great Abilities to give it any Countenance, and the moſt irrefragable Argument to force the Concluſion.

I muſt alſo remind your Lordſhips again, that the Sentence has been read in this Stage of the Proceeding, by the Conſent of the Proſecutor, and under the expreſs Reſervation of his Right to object to the Competence of it, as Evidence on the Iſſue joined, unleſs he ſhould think fit to make it Part of his own Cauſe. At preſent it ſtands admitted merely as the Ground of this previous Motion. The Sentence being colluſive, is a Nullity. If ſair, it could not be admitted againſt the King, who was no Party to the Suit. If admitted, it could not conclude in this Sort of Suit, which puts both Marriages in Iſſue. The Objections ariſe from the general Nature of the Sentence propounded, which is never final; from the Parties, who could not, by their Act, bind any but themſelves, or thoſe who are repreſented by them, or at moſt thoſe who might have intervened in the Suit; from the Nature of the preſent Indictment, which puts the Marriage directly in Iſſue; from the Circumſtances peculiar to this Sentence, which prove it to be colluſive.

Without adverting much to thoſe Particulars, the learned Counſel for the Priſoner affected to lay down an univerſal Propoſition, that all Sentences of peculiar Juriſdictions are not only admiſſible, but concluſive Evidence; and referred to many Caſes, of which I ſhall controvert nothing, but the Application.

The Caſe of *Burroughs* and *Jemineau*, 2 *Str.* 733, is nothing to this Purpoſe. That was a ſuppoſed Contract by accepting a Bill of Exchange at *Leghorn*; which Acceptance was void by the peculiar Laws of that Country, becauſe the Drawer had failed without Aſſets in the Hands of the Acceptor; and was pronounced to be ſo by a competent Court in *Leghorn*. The Plaintiff inſiſted upon it; becauſe, if the Acceptance had been made here, it would have bound. But, according to the Law of the Place where it was made, the Acceptance did not conſtitute a Contract. The Plaintiff might, if he had been adviſed otherwiſe, have defended that Suit; he acquieſced in the Deciſion.

Courts of Admiralty ſit between Nation and Nation. They proceed *in Rem*, and they bind the Property, not only againſt the apparent Poſſeſſor, but all the World; or elſe the very Exiſtence of the Court would be ſubverted. Any Body may claim; and proper Monitions iſſue for that Purpoſe. Therefore, in the Caſe of *Hughes* and *Cornelius*, the Plaintiff failed in his Action of Trover; although the Verdict found his Property, and conſequently the Sentence of the *French* Admiralty erroneous; becauſe the Court had no ſuch Juriſdiction over that Sentence. For the ſame Reaſon, in *Green* and *Waller*, the Sentence of the Admiralty could not be gain-ſaid. There is no Appeal but to the Sword.

The ſame Principle governs as to Seizures in the Exchequer; where any Perſon may come in and claim; which if they neglect, they tacitly aſſent to the Condemnation. So of Seizures tried before the Commiſſioners of Exciſe.

So in the Caſe of *Moody* and *Thurſton*, 1 *Str.* 481, where an Act of Parliament gave an Action (on a Certificate of Commiſſioners that Money was due from an Agent to Officers of the Army) the Agent could not defend, by controverting the Truth of the Certificate. It was contrary to the Act, and he might have been heard before the Commiſſioners.

Where a Soldier had complained of his Major for undue Correction to a Court Martial, which diſmiſſed his Petition, he could not maintain an Action, for he had been heard in a Court competent and final to that Purpoſe.

No temporal Remedy lies to recover Poſſeſſion of a Benefice forfeited by Deprivation, while the Sentence of a Court competent to declare the Forfeiture remains in Force.

The ſame Rule holds as to derivative Claims. Therefore the Judgment of *Ouſter* againſt a Mayor is good Evidence againſt the Corporator, who claims under him.

Thoſe who enter into collegiate Eſtabliſhments agree to ſubmit themſelves to the Laws and Magiſtrates appointed by the Founder; and conſequently cannot reclaim againſt them. This was all which was determined in *the King* and *New College*, and many other Caſes which might have been referred to under the ſame Head. In moſt, if not all, the Caſes cited, the Parties had actually been heard before the proper Tribunal.

The Office of granting Probate and committing Adminiſtration is a ſpecial Authority committed to the Eccleſiaſtical Courts, where all, who claim Intereſt, may be heard; ſo there can be no Defect of Juſtice. Therefore, in a vaſt Abundance of Caſes from *Noel* and *Wells* ſoon after the Reſtoration, to *Barnſley* and *Powell* in Lord *Hardwick*'s Time, the Temporal Courts have refuſed to take Cognizance of the Right of perſonal Repreſentation. All the Caſes under this Head prove no more.

Caſes were alſo cited to prove, that Iſſues joined upon the Lawfulneſs of Marriage, Profeſſion, general Baſtardy, and ſo forth, muſt be tried by the Biſhop, and to infer that his Juriſdiction is excluſive; and the Statute of 9 *H.* VI. c. 11, was cited to prove, that it is final not only to Parties and Privies, but to Strangers. The Effect of that Statute is rather to prove, that all the World are, or may be, Parties or Privies. The only public Object of it is to provide ſufficient Notoriety to make them privy in Fact, as well as in Law. It provides a great Variety of Proclamations, to the End "that all Perſons, pretending any In-"tereſt to object againſt the Party which pretendeth himſelf to be Mulier, may ſue to "the Ordinary, to whom the Writ of Certificate is or ſhall be directed, to make their "Allegations and Objections againſt the Party which pretendeth him to be Mulier, *as the* "*Law of holy Church requireth.*" For the Reſt, the Statute ſeems to have been an Act of Violence and Fraud, by the powerful Pretenders againſt Lady *Audley*. The Miſchief, they affected to dread, could not happen. A Certificate is utterly void, unleſs made upon Proceſs, at the Inſtance of the Parties. The Certificate of Mulierty binds the Parties to the Suit (as in all Reaſon it ought, while ſuch a Trial is tolerated) but nobody elſe: And ſo it had been often decided before; and yet the Statute provided that every ſuch Writ and Certificate at the Suit of Lady *Audley* ſhould be void. On the other Hand, no ſuch Iſſue as Profeſſion, Baſtardy, or lawful Matrimony, could be tried by the Biſhop between Strangers; and when tried by the Country, it bound only thoſe who were Parties to the Trial and Attaint. Nor was an Infant bound to anſwer a Plea of general Baſtardy. But whether the Concluſion was too extenſive or not in theſe Caſes, ſtill it was only in reſpect to a Civil Right, and tried by a competent Juriſdiction, fitting for the expreſs Purpoſe of deciding upon it, the Juriſdiction being created and eſtabliſhed by the Writ.

Sentences, which are given by the Biſhop or his Official of his own mere Authority in Matrimonial Cauſes, have the leaſt Pretence of all others to bind or influence any Queſtion which may ariſe afterwards in Judicature. Such Cauſes puniſh no Crime, try no Right, proceed to no Civil Effect. They proceed *pro ſalute animæ Rei*, to reform ſome Enormity or Neglect in religious Life; *in qua* (ſays *Covarruvias* in his Epitome of the Fourth Book of the Decretals, Par. 2, C. 8, S. 12, N. 1.) *de maximo Sacramento agendum eſt.* The Proceſs is, *ſimpliciter, de plano, ſine Strepitu et Figurâ Judicii, Clement.* Lib. 2, T. 1. S. 2, From the very Nature of ſuch a Cauſe, it muſt follow, that the Judgment cannot be final. No Conſent of Parties, or Omiſſion to appeal, or repeated Affirmation of the ſame Judgement, gives it any Force. *Quia Sententia illa Tranſiens in Rem judicatam foveret peccatum, ſeperando veros Conjuges, vel uniendo eos, qui tales eſſe nequeunt. At nullum vinculum, quantumcunque multiplicatum, poteſt firmare Actum, ex quo Peccatum conſurgit.* Sanch. de Matrim. Lib. 9, Diſputat. 100. In the ſame Diſputation *Sanchez* ſays, *Poteſt etiam Judex, ex officio, Parte invitâ, procedere ad retractandam hujuſmodi Sententiam; imo ad id teneri Judicem probat Textus; quia ſui intereſt Peccata auferre. Hinc deducitur, certâ Regulâ preſcribi minime poſſe, quoties audiendus ſit volens prædictam Sententiam impugnare.* He illuſtrates the Doctrine, by obſerving, that in *Coſts*, which is a *Civil Intereſt*, a Matrimonial Sentence is binding. *Ratio eſt aperta: Sententia enim Matrimonii ideo non tranſit in Rem judicatam, ne foveretur Peccatum, ſuſtinendo Matrimonium Irritum, aut diſſolvendo validum; quæ Ratio in Expenſarum Condemnatione ceſſat; et ideo ſortitur Naturam aliarum Sententiarum, quæ in Rem judicatam tranſeunt.* *Gaill*, in his Obſervat. 107, and Obſ. 112, holds exactly the ſame Language.

The ſame Rule obtains, for the ſame Reaſons, in all Sentences *pro ſalute animæ.* A Sentence is inconcluſive (ſays *Vulteius* in his Treatiſe *de Judiciis*, Lib. 3, C. 12, S. 38.) *ex Qualitate Cauſæ; puta, quod eſt Matrimonialis, vel alia quæcunque, in quâ Animæ Periculum verſatur.* *Scaccia*, a very authoritative Writer on the Effect of Sentences, in his Book *de Sententia Gloſſ.* 14, *Queſt.* 2, *N.* 44, obſerves as a general Rule, *Sententia, in quâ vertitur*

animæ periculum, nunquam tranſit in rem Judicatam. The Sum of their Maxims is given by *Oughton*, Tit. 205. which is taken almoſt literally from *Conſett*, and by him extracted from the Books of Practice.——" Although, generally, Witneſſes are not admitted after Pub-
" lication, yet in a Matrimonial Cauſe they are, even without Oath, that they are come to
" the Knowledge of the Parties after Publication. And, ſuppoſing that Sentence has paſſed
" againſt the Plaintiff, that he has failed in Proof of his Libel, and the Defendant is
" acquitted; yet the Plaintiff may either in the ſame Cauſe, or in another, raiſe a new Suit
" againſt the ſame Perſon, not only on a new or ſecond Contract, but on the former, and
" produce Proofs known or unknown to him before: And he is not bound by the
" *Exceptio rei judicatæ*, or that the former Sentence has paſſed *in rem Judicatam*; becauſe
" a Sentence given in a Matrimonial Cauſe never paſſes *in rem Judicatam*, and has many
" Privileges. When the Church is deceived in promulging Sentence againſt Matrimony,
" the Sentence may be revoked by new Proofs, and even by the ſame; and the Reaſon is,
" to eſchew Sin and Danger to the Soul if a wrong Sentence ſhould prevail."

So far as it appears to us is therefore no idle Form of Words, but an expreſs Reſervation of a neceſſary Power to alter the Sentence whenever it ſhall appear to the Biſhop that a different Rule of Life is neceſſary *pro ſalute animæ Rei.*

The Miſtake ſeems to have ariſen from conſidering the Biſhop as a Court of Civil Judicature, and his Sentence as pronounced upon the Trial of a Civil Right. In this perverſe View, thoſe Maxims are abſurd, and thoſe Rules merely vexatious, which, tried by the real Nature and End of a Matrimonial Suit, are founded in Piety and Zeal for the Diſcipline of Religion. In all Civil Cauſes the Maxim is univerſal, *Expedit Reipublicæ, ut finis aliquis ſit Litium.* In Proceedings *pro ſalute animæ*, the Reaſon of the Thing is altogether on the other Side.

Even in the Moment of ſtating theſe Sentences to be concluſive, One of the learned Counſel could not forbear to give your Lordſhips a lively Repreſentation of the Frivolouſneſs of their Proceedings and the Vanity of their Decrees. The Doctors have been at the Pains to write (ſays my learned Friend) ſome Waggon Loads of Volumes to prove, that theſe Matrimonial Cauſes proceed to no End, and terminate in nothing. All Parties, all Privies to the Suit, all who have Intereſt in the Matter of it, may prevent its Effect by Intervention, by Citation to hear the Decree reverſed by original Libel. The Sketch was drawn with a great Deal of Humour, bordering upon Ridicule: A Vivacity natural enough within the Walls of their own College. *Vetus illud Catonis admodum ſcitum eſt; qui mirari ſe aiebat, quod non rideret Haruſpex, Haruſpicem cum vidiſſet.* Yet it ſeemed rather aſtoniſhing, that ſo very judicious an Advocate ſhould think this Picture of Futility the beſt Recommendation of the Sentence to your Lordſhips as an abſolute Concluſion upon all your Proceedings. Here all the World ſhall be bound by that Judgment, which the Court, who pronounced it, hold for no Judgment, and will ſuffer to bind nobody. But ſuch was the Neceſſity of the Argument; to give it any Effect, they were forced to aſſume, that this Sort of Sentence is the Judgment of a Civil Judicature upon a Civil Subject, which is not true; and to give it Effect againſt others than Parties, they were forced to admit, that ſuch others may ſet it aſide; which is true, only becauſe it is no ſuch Judgment.

In Support of this looſe Propoſition, they cited from our own Books ſeveral Caſes, in which the Temporal Courts ſuffered themſelves to be concluded by ſuch Sentences.

If it were neceſſary or allowable at this Day to reaſon againſt ſo many Authorities, I ſhould incline to think, that thoſe Caſes proceeded upon the Miſtake I mentioned before, namely, that the Eccleſiaſtical Court try and pronounce upon the Civil Right of Marriage, or ever mean to do ſo, except when authoriſed by Writ of the King's Courts. But for the Purpoſe of the Argument I will ſuppoſe that they do; even then the Effect of all the Caſes will amount to no more than this. Firſt, the Eccleſiaſtical Juriſdiction has (excluſively) Conuſance of the Right of Marriage. Secondly, the Secular Juriſdiction has Conuſance of the Temporal Intereſts, which are incident to Marriage, and, in order to decide upon them, muſt try the Fact of Marriage as Part of the Queſtion. Thirdly, but the Judgment of the Eccleſiaſtical Juriſdiction on the Principal, *viz.* the Right of Marriage, wherever it occurs, is final upon the Trial of the Incident. Fourthly, this Concluſion extends to all who were Parties or Privies, or who, in Notion of Law, have committed Laches in not intervening or reclaiming. This I take to be the utmoſt Extent of the Caſes cited.

The earlieſt Caſe referred to was *Corbett*'s, Fitz. Tit. Conſultation Pl. 5. Sir *Robert Corbett* had iſſue *Roger* by his Wife *Matilda*; in whoſe Life he married *Letitia*, and had iſſue *Robert*. *Roger* ſued in the Court Chriſtian to avoid the Second Marriage, but was prohibited, for that Court had no original Juriſdiction. " Otherwiſe," ſays *Cateſby*'s Juſtice, " if my Father
" and Mother, were divorced, married to others, had Iſſue, and died. Then I grant well,
" that

" that I ſhall have my Suit originally in the Court Chriſtian, becauſe I cannot have my " Action in the Temporal Law, as Heir, during the Divorce; and alſo the Divorce is a " Spiritual Judgment, which ſhall be reformed in the Spiritual Courts." So it was doubted, whether " the Brother of a Monk, who abandoned his Habit and Vows, could, " as Heir, libel to try his Brother's Profeſſion, and hold him to Obedience; for he might " have his Action by the Temporal Law, and object his Profeſſion." But it was agreed, " That if the Monk had been deraigned for falſe or unjuſt Cauſe, the Brother might have " Citation to revoke his Deraignment." If this proves the Effect which a Spiritual Sentence upon the principal Matter, the Right of Marriage, or Profeſſion, has in Caſes where theſe come incidentally into Queſtion, it alſo confines the Extent of that Effect to thoſe Perſons who may reſcind the principal Sentence; and proves the Reaſon of it, namely, that they are not wronged by the Concluſion, becauſe they may always be heard againſt it.

The next Caſe was *Bunting* and *Leppingwell*, 4 *Co.* 29. *a.* and *Moor* 169; which was thus found by Special Verdict. *Thomas Twede* married, *de Facto*, *Agnes Adinghall*, but under the Impediment of a Pre-contract between her and *John Bunting*. *Bunting* ſued in the Court Chriſtian on this Pre-contract, obtained Sentence for Celebration *in facie Eccleſiæ*, married her, and had Iſſue Two Sons, *Charles* and *Robert*. *Richard*, the Father of *John*, gave Lands to *Robert*, for Life only. *Robert*, miſtaking his Title, ſettled them on *Emma* his Wife, and died. *Charles* brought an Ejectment, as Heir to *Richard*, his Grandfather. It was objected that *Twede* had been no Party to the Suit in the Court Chriſtian. But *Twede* might have intervened, or reclaimed, all his Life long. So might *Emma*, if it could have availed her to prove her Huſband illegitimate, which would have deſtroyed her Title. But *Twede* had abandoned his Pretenſions. The Sentence was ſubmitted to by *Agnes*. The Marriage was ſolemnly celebrated, and remained uninterrupted during Life. The Queſtion was between Two Iſſues. It required little Argument to ſuſtain the Legitimacy.

The next was *Kenn*'s Caſe, 7 *Co.* 68. Cro. Ja. 186. An *Engliſh* Bill was brought in the Court of Wards, praying Leave to traverſe an Office, whereby *Elizabeth* was found the Infant Heir of *Chriſtopher Kenn*, and whereupon the Wardſhip had been granted to *Florence* the Mother of the Infant. *Chriſtopher Kenn* had married *Elizabeth Stowell*, by whom he had Iſſue *Martha*, who left Iſſue *Elizabeth* the Plaintiff, his Heir at Law, if the Marriage had ſtood; but in the Firſt and Second of *Philip* and *Mary* the Court of Audience pronounced the Marriage void for Want of Age, and gave Sentence of Divorce. *Chriſtopher Kenn* married *Elizabeth Beckwith* in the 5th of *Elizabeth*. She libelled him for Jactitation before the Commiſſioners for Eccleſiaſtical Cauſes, alledging his former Marriage. *Elizabeth Stowell* intervened for her Intereſt. The Firſt Marriage was a Second Time pronounced void, and Sentence followed *ad exequenda Conjugalia obſequia*. After the Death of *Elizabeth Beckwith*, *Chriſtopher* married *Florence*, by whom he had the Ward. This Matter was referred to all the Judges, who pronounced the Sentence concluſive, ſo long as it ſhould remain in Force. And Lord *Coke* relied upon *Corbett*'s Caſe, the Doctrine of which has been explained before. The Point had been Twice tried with *Elizabeth Stowell*, the Grandmother of the Plaintiff, and the Sentences remained, open to Litigation, but ſubmitted to.

The Caſe of *Jones* and *Bow*, *Carth.* 225, it has been obſerved before, was of exactly the ſame Sort. The Plaintiff claimed under the Iſſue of Sir *Robert Carr* by *Iſabella Jones*, between whom a Sentence had obtained againſt the Pretence of Marriage, which then ſtood unlitigated.

In *Jeſſum* and *Collins*, 2 *Salk.* 437, there was a Sentence againſt the Plaintiff in the Spiritual Court, at the Suit of the Defendant, on that very Contract, for which he brought his Action on the Caſe, without diſputing the Sentence.

The Caſe of *Hatfield* and *Hatfield* was alſo cited; a Judgment of your Lordſhips in the Year 1725. No Authority is more concluſive than the Judgment of ſuch a Court, when the Point decided is well underſtood: But nothing is more uncertain than the State of a Point drawn from the printed Caſes, where each Party takes Care to ſtate, at leaſt, a probable Caſe; and in the Multitude of the Reaſons, good perhaps in Law, if they were true in Fact, it is difficult to divine what the Houſe went upon. If this Judgment depended, as the Counſel for the Priſoner contended, upon the Goodneſs of the Marriage, it carries the Matter no further than Abundance of other Caſes; namely, that the Sentence of a Court Chriſtian, while nobody conteſts it, binds the Right of Marriage between Parties diſputing elſewhere an incidental Intereſt under it. There was an Attempt, to make it prove a colluſive Sentence available, which I ſhall have Occaſion to examine hereafter.

In *Cleeve* and *Bathurſt*, 2 *Str.* 960, and *Annaly* 11, the Sentence was againſt the very Plaintiff in the Cauſe, and remained uncontroverted.

So

So *Da Coſta* and *Villa Real*, 2 *Str.* 961, or *Mendez* and *Villa Real*, *Annaly* 18, was a Sentence uncontroverted between the ſame Parties.

The like Obſervation occurs upon Mr. *Hervey*'s Caſe.

In *Blackham*'s Caſe, 1 *Salk.* 290, the Sentence was not held to be concluſive; and as to Lord *Holt*'s Doctrine, that muſt ſuppoſe the Marriage put in Iſſue between the ſame Parties; for otherwiſe the Sentence would not have concluded; the Court, which grants Adminiſtration, having no direct Juriſdiction in Matrimony.

In *Milleſent* and *Milleſent*, cited by Dr. *Lee* in Lord *Annaly* 11, which I take to have been an Appeal from the Prerogative Court, a Sentence of the Conſiſtory Court againſt a Marriage was, while it remained unlitigated, a Bar to the Woman, who had been Party to that Sentence, from claiming Adminiſtration as Wife.

Upon all theſe Caſes I ſhall repeat but One Obſervation; namely, that they bound only thoſe who had been Parties to the former Sentence, or who derived under ſuch Parties. If they had extended to ſuch as might have become Parties by Intervention or Citation, the ſame Principle would equally have borne them out. The general Peace and Happineſs require, that there ſhould be ſome Reſort to hear and determine upon Rights. The ſame Peace and Happineſs require, that Litigation ſhould have ſome End. The Line ſeems to be fairly drawn, where every Claim to every Right has had the full Opportunity of being heard. But, among all the Caſes cited or referred to, I believe none is to be found, where a Sentence has been taken for concluſive againſt Perſons, who neither had, nor could poſſibly have agitated it.

It is not enough therefore to eſtabliſh the Propoſition, that ſuch Sentences bind all who have or could have interpoſed, unleſs it had been ſhewn that the King could have interpoſed, for the Publick Good, in order to ſee that no Fraud ſhould be practiſed, which might tend to defeat the Execution of his Laws or Police: But it is not pretended that the King can interpoſe in ſuch Cauſes.

It is not enough that a Court of excluſive Civil Juriſdiction, pronouncing upon the principal Right, binds all the derivative or incidental Intereſts. It ſhould be ſhewn, that ſuch a Court binds alſo to Criminal Concluſions: Now this I take to be impoſſible, becauſe, on the very State of the Propoſition, the Court has no Criminal Juriſdiction.

It has often been attempted in Argument to ſhew, that their Courts have no more than a Cenſorial Juriſdiction in their Proceedings *pro ſalute animæ, et reformatione morum*; and to infer from thence that their Judgments ought not to bind in Queſtions touching Civil Rights; as in *Mendez* and *Villa Real* in *Annaly:* But our Courts have taken the Fact to be otherwiſe, and conſidered their Sentence as a Judgment upon the Civil Right, which is the Reaſon, why it binds all incidental Intereſts in other Courts of Civil Juriſdiction. The true Reaſon, why ſuch Judgments have no Effect in a Criminal Court, ſeems to be this, that there is nothing in common between the Juriſdictions, ſo that they can never claſh. A Judgment in a Civil Suit will bind to all its Conſequences, although every Fact, upon which it proceeded, ſhould be evidently falſe; and though a Criminal Court ſhould have found a Crime upon an oppoſite State of the Caſe. An Action and an Indictment for a Treſpaſs may have contrary Iſſues, and yet both muſt ſtand: So it would be if the Crime were aſſigned in the very Falſhoods, by which the Civil Court was deceived; as in Indictments for Perjury or Forgery. A Judgment upon a Deed, after Verdict on *non eſt Factum* pleaded, is no Bar to an Indictment for forging, or publiſhing, or ſwearing to the Deed. The Caſe would be the ſame in reſpect to a Will of Lands eſtabliſhed by Verdict, or to a Will of Perſonalty after Probate.

It was in this laſt Inſtance they attempted to ſhew, that the Authority of the Eccleſiaſtical Court had been interpoſed between public Juſtice and the Crime of Forgery. For this Purpoſe they have cited the Caſe of *the King* and *Vincent*, 1 *Str.* 481. It is very ſhort: "Indictment for forging a Will relating to Perſonal Eſtate; and on the Trial the Forgery "was proved; but the Defendant producing a Probate, that was held concluſive Evidence "in Support of the Will." Now the Support of the Will was not in Queſtion. It was proved in common Form, which is not binding, even in the Spiritual Court. 1 *Ro.* Rep. 21. More Particulars of this Caſe may probably be known to ſome of your Lordſhips; but I cannot find any. Stated thus, it certainly requires a great Deal of Conſideration, before it be admitted as Law. Here the Queſtion was, not whether the Sentence ſhall have Credit in reſpect of the Underſtanding, which the Spiritual Judges have in the Rules and Courſe of their own Law, but whether a Probate, granted of Courſe, on the Oath of the very Party charged with the Forgery, ſhall be a full and concluſive Bar to the Proſecution. This is too monſtrous to be left upon the Authority of a ſhort and ſingle Caſe, without condeſcending to explain what Conſiſtency with Publick Juſtice, what Reſpect to Common Senſe will allow the Crime of Forgery or Perjury to be defended by the Allegation of that very

Fraud, which the Indictment meant to puniſh; not ſtating any Trial, or Judgment upon it, but merely that it had been practiſed. If the pretended Executor had repelled the Objection of Forgery, even in that Court, it would have borne ſome Countenance at leaſt; but the Fraud paſſed without Examination, where, in the Nature of the Proceeding, none could be had.

The other Caſe, in 1 *Str.* 703, of *the King* and *Rhodes*, proves nothing, for it was merely a Queſtion of Direction; whether the Court would proceed to try the Forgery of an Inſtrument, while the Property to be affected by it remained *ſub Judice*.

This is a Matter of great Conſequence to Publick Juſtice; at the ſame Time it is the Sort of Caſe, which muſt happen frequently. The Fraud was commonly practiſed in the late War upon the Sailors; and, if this Rule had exiſted, could never have been puniſhed: But it was frequently puniſhed; and although, where no Point of Law aroſe, it is difficult to recover Caſes at the *Old Bailey* or on Circuits; yet an accidental Publication of Caſes in the *Old Bailey*, without any apparent Selection, has produced Three or Four Inſtances. One *Stirling* was convicted and hanged for forging a Will; and, ſo little were either Proſecutor or Court appriſed of this Notion of Law, the Probate made Part of the Evidence againſt him. He had regiſtered it (as it was neceſſary) in the South Sea Houſe. I am not anxious to ſtate theſe Caſes with more Particularity; becauſe I cannot bring myſelf to imagine it will be entertained as a ſerious Opinion, that the mere Perpetration of a Crime may be pleaded in Bar to a Proſecution for it. This is certainly not for the Intereſt of Juſtice; nor for the Honor of the Spiritual Court; becauſe it would take away from that Juriſdiction One Guard againſt Falſhood and Fraud, of which every other is poſſeſſed.

Thus much concerning the general Propoſition, that Sentences in the Eccleſiaſtical Courts, upon Civil Rights within their Conuſance, have concluſive Force upon Publick Proſecutions for Crimes; although it be confeſſed withal, that the Publick has no Means to intervene, or review thoſe Sentences; and although the Civil Effect of ſuch Sentences is not touched by the Event of ſuch Publick Proſecutions. If this Ground fails, there is an End of the preſent Motion: But there is another View, in which it has been urged upon your Lordſhips, which ſeems to turn out more deciſively againſt it.

Whatever may be ſaid in the Inſtances of Forgery, Perjury, and other Frauds upon the Spiritual Court, where the Criminal Court may ſeem to impeach the Foundation of their Sentences, without aſſuming any Juriſdiction in the Matter of them; in this Caſe it is impoſſible to alledge, that the Criminal Court is not fully competent to decide upon the whole Matter of the Indictment; particularly on both the Marriages there ſtated, as conſtituting the Crime.

The learned Gentleman, who ſpoke Second for the Priſoner, informed your Lordſhips, that this Crime was formerly puniſhed by the Canon Law, and in the Eccleſiaſtical Court; and inſiſted, that transferring the Puniſhment of it from the Eccleſiaſtical to the Temporal Juriſdiction ſhould not prejudice any Defences, which the Party might have ſet up in the Firſt Court.

In order to make that Obſervation bear, ſome Proof ſhould have been added, that this Sentence would have barred ſuch a Suit, however promoted, *exceptione Rei Judicatæ*. Then, ſuppoſing this Juriſdiction no better than concurrent, this Court might have been barred, *pari ratione*. But your Lordſhips have already had the Trouble of hearing it eſtabliſhed, but too much at Length, from their Books, that no ſuch Exception would lie in their Law.

The ſame Thing is no leſs true in our Law, where the Court can, by any Means, take Conuſance of the Right of Marriage. Thus in Dower, where the Common Pleas, by writing to the Biſhop, can well try the Lawfulneſs of the Marriage, a Sentence is no Plea. This was ruled in the Caſe of *Robins* and *Crutchley*, 2 *Wilſon* 118, 127. The Demandant counted as of the Endowment of *Robins*: The Tenants pleaded, that ſhe was not accoupled to *Robins* in lawful Matrimony. The Demandant replied, that on the 12th *February* 1754, Sir *William Wolſeley* libelled her as his Wife, in the Biſhop's Court of *Litchfield*, for Adultery with *Robins*; that ſhe pleaded a Marriage with *Robins*; that the Cauſe was removed into the Arches; that *Robins* died; and that afterwards Sentence paſſed for the Marriage with *Robins*, which then remained in Force. The Tenants demurred; and had Judgment. The Demandant cited many of the Caſes your Lordſhips have now heard, to prove, that a Sentence, by a Court of direct Juriſdiction, ought to conclude another, which has but incidental Conuſance of the ſame Matter. But theſe were not thought ſufficient to avoid another Trial of the ſame Marriage in a Court, which, by writing to the Biſhop, might well decide upon the

Lawfulneſs of it. It is clear, that the Sentence would not have concluded in the Trial before the Biſhop.

Nay, the very Statute, on which the Indictment is framed, proves the ſame Thing. It excepts the Caſes, where the former Marriage is diſſolved, or declared void by Sentence, or was contracted under Age of Conſent; all which would otherwiſe have been triable under an Indictment for Felony.

In order to prove, that any Sentence in the Eccleſiaſtical Court would bar an Indictment upon the ſame Matter, the Caſe of *Boyle* and *Boyle* was cited. It is reported in 3 *Mod.* 164, and in *Comberbatch* 72. In that Caſe a Prohibition was awarded to ſtop the Trial, in the Eccleſiaſtical Court, of a Marriage there claimed by a Woman, in Anſwer to a Suit of Jactitation; which Marriage had been found bad on an Indictment for Polygamy, for which the Man was convicted and burnt in the Hand. The Reaſon aſſigned, here, for this Judgment was, for fear the Spiritual Court ſhould not take Notice of the Judgment pronounced in the Temporal Court. But this would have been extremely irregular; particularly if by the Courſe of the Spiritual Court ſuch a Judgment would have been concluſive. Prohibition never goes upon an Apprehenſion, that the Spiritual Court will do wrong; but where their Rules of Trial are contrary to the Common Law, as in Preſcription, or requiring Two Witneſſes to a Releaſe; or when they exceed their Juriſdiction, by holding Plea of Temporal Matters as Debts, Freehold, or Temporal Offences. The Reaſon for granting this Prohibition was, becauſe the Court Chriſtian could not take any Conuſance of a Matter adjudged in the Temporal Court; which thereupon became Temporal. So in the Caſe of *Webb* and *Cook*, *Cro. James*, 535, 625, Prohibition went to the Court Chriſtian at *Norwich*, for entertaining a Libel for Defamation, in ſaying, that One had a Baſtard, who was adjudged the Putative Father: "For that Judgment, being under the Authority of the Statute Law, "ſhall not be impeached in the Spiritual Court, or elſewhere; and all are concluded to ſay "the contrary." Upon the Authority of this Caſe the ſame Point was ruled again in *Thornton* and *Pickering*, 3 *Keb.* 200. The Eccleſiaſtical Court has no Conuſance of Crimes. In the Caſe immediately before that of *Boyle* and *Boyle*, Prohibition went to ſtop a Suit there for writing a Libel; becauſe an Indictment will lie for it. In *Serle* and *Williams*, *Hob.* 288, this Matter is fully treated. The Ordinary has no Power, even over Clergymen, in a Crime or Offence touching the Crown. Purgation itſelf was by Permiſſion; and could not be adminiſtered, if the Temporal Court delivered *abſque purgatione faciendâ*; nor between the Conviction and Sentence; nor before it. In all theſe Caſes Prohibition would lie. And in every other Caſe, if after Trial of a Felon they prove or diſprove any Thing againſt a Verdict, Prohibition lies. So in *Higgon* and *Coppinger*, Sir *William Jones*, 320, Prohibition went to ſtop a Libel for calling one a Sodomite. "For, as they cannot find the principal Offence, it not being "ſaved to them by the Statute, they ſhall not hold Plea of the De-"famation. And, where any Thing determinable by the Eccleſiaſtical Court is made Fe-"lony, or Treaſon, and the Power of the Eccleſiaſtical Court is not ſaved to it, there they "ſhall not meddle with the Offence; or the Defamation, which ariſes out of it." The true Reaſon therefore, why they were prohibited in the principal Caſe, was, becauſe the Plea depending before them was out of their Conuſance.

Another Caſe was cited, where Prohibition went to the Conſiſtorial Court of *Exeter*, after Acquital upon an Indictment for Polygamy: But I have not been able to find it.

More perverſe Inferences were never extorted from any Caſes, than from theſe. A Court of Oyer and Terminer is to determine without hearing, for this ſpecial Reaſon, that it will be final. A Court of direct, complete, and excluſive Juriſdiction, is to be bound and governed by One of no Juriſdiction, either direct or indirect, on the Matter. A Court, which decides once for ever, is to be bound by one which never decides. The Sentence remains open for further Examination; let it therefore be adopted without Examination; in order that it may never be examined.

But, to confeſs the Truth, all which I have hitherto ſaid ſeems to have been unneceſſary. This might have been pertinent Argument, if there had really been a Sentence to combat: But there is none. It has been virtually, if not expreſsly admitted, that, for the Purpoſe of deciding upon the preſent Motion, your Lordſhips muſt take it for granted, that the Sentence is colluſive and fraudulent in every View, and to every Degree, which Imagination can repreſent: For your Lordſhips will not put us, in this Stage of the Buſineſs, to take ſeparate Iſſues upon every Suggeſtion which may be made for the Priſoner. In Truth her Counſel have argued it ſo; expreſsly contending, that a colluſive Sentence ſhall bind the Judgment of the Houſe.

But

But what Kind of Caſe has been made, or attempted? What Authority has been cited, that a colluſive Sentence ſhall prejudice others, than the Parties to it? In every Book, I have ſeen, it is treated as a mere Nullity. The only Difference between no Sentence, and a colluſive one, is, that in the Firſt Caſe, you plead *nul tiel record*, generally; in the laſt, you plead, that it was obtained by Covin; conſequently it is waſte Paper. If the Court was informed of the Covin, it would commit the Parties for the Contempt, and cancel the Record. This could only be done upon the Idea of the whole Proceeding being a Nullity.

In the 44 *E.* 3, 45, *b.* In Aſſize of novel Diſſeiſin, by a Dowreſs, the Tenant admitted her Title to Dower; but diſputed her Aſſize, becauſe ſhe had been endowed by one, who abated upon his Poſſeſſion by Covin with her. She argued, that the Abator gained a Fee Simple, whereby he might lawfully endow her; that Recovery of Dower againſt an Abator is ſufficient; and that Endowment *in Pais*, to one who has Right, is equal to Recovery. The Tenant replied, that ſuch Endowment was but Diſſeiſin; therefore his Entry was congeable; and that the Recovery would have been in the ſame Plight All the Judges held clearly, that "if one has Action to certain Lands, and by his Aſſent and "Covin the Tenant is ouſted, and he, who has the Action, brings it againſt the Diſſeiſor, "he, who is ouſted, ſhall have Aſſize; and the Poſſeſſion of him, who recovered, ſhall be "adjudged by Abatement, and not by Recovery; becauſe he was a Diſſeiſor. *Et hoc "adjudicabatur coram Knivet.*"

The ſame Point is laid down in many Books; and in 3 *Co.* 78, it is taken as a general Rule, "That the Common Law ſo abhors Fraud and Covin, that all Acts, as well "judicial as others, and which of themſelves are juſt and lawful, ſtill, being mixed with "Fraud and Deceit, are in Judgment of Law tortious and illegal." Nay, it takes away the Privilege of Coverture and Infancy; for the Act is merely void. In the Caſe in *Coke*, the Fine (a judicial Act) was held for none, by reaſon of the Covin. So *Farr* and *Chadwick* were both hanged for Burglary, though they entered by an *Habere facias Poſſeſſionem*; becauſe it iſſued upon a fraudulent Judgment. This was thought to heighten the Offence.

The Principle of the Rule applies equally to the Judgments of the Eccleſiaſtical Court; and ſo the Rule was applied in *Dyer* 339, where a Revocation of Letters of Adminiſtration was held void for Covin. Thus too in *Garvan* and *Roach*, 1 Veſ. 157. Lord *Hardwick* ſays of Sentences in the Eccleſiaſtical Court, that Colluſion will overturn the Whole.

It would be idle Affectation to cite all the Caſes on this Head, which Indexes would furniſh. The Books are full of them from the Annals of *Edward* the Second to the Reports of Sir *James Burrow*. Indeed there never was a Period of Time, in which this Maxim was ſo continually in the Mouth of the Court, as the laſt. *Bright* and *Eynon*, and Abundance of Caſes more might be cited to prove this. The Court ſeems to have thought it the principal and moſt capital Part of its Duty, the *Nobile officium judicis*, to ſuppreſs and extinguiſh every Species of Fraud.

My Lords, The Language of the Civilians and Canoniſts is exactly the ſame. *Scaccia*, in his Book *de Sententiâ*, *Gloſſ.* 14, *Queſt.* 12, ſtates this Poſition, *ex vulgatâ regulâ*, *Rem inter alios actam aliis non nocere.* Upon this he makes many Limitations; upon all of which he adds, amongſt others, this Sublimitation; *Quando Sententia eſſet lata per Colluſionem: Fraus enim, et dolus nemini patrocinari debent, in alterius præjudicium; et ideo Sententia, lata per Colluſionem, habetur pro non Sententia; et aliis non nocet; quamvis, ſublatâ Colluſione, noceret.* The ſame Thing is laid down by *Covarruvias*, in his Practical Queſtions, Cap. 15. N. 2. He quotes this Text of the Digeſt. *Si hæreditatis Judex contra hæredem pronunciaverit non agentem Cauſam, vel Colluſione agentem, nihil hoc nocebit Legatariis.* In *Heraldus de re judicata*, Lib. 1. Cap. 2, N. 1, the ſame Rule is given upon the ſame Authority.

Nay, their Courts will receive an Allegation againſt a Judgment at Common Law, that it was by Covin; and rightly too; for it is a Nullity; and the Authority of the Court, in which Fraud is practiſed, is never in Queſtion. In *Lloyd* and *Maddox*, *Moor* 917. One ſued in the Court Chriſtian for a Legacy. The Executor pleaded Recovery in Debt, which exhauſted Aſſets. The Legatee replied, that the Recovery was by Covin. This Allegation was admitted; and the King's Bench refuſed to award Prohibition. Here both Courts agreed, that to alledge a fraudulent Judgment was to alledge nothing; and the inferior Juriſdiction was expreſly permitted to try this Sort of Nullity in the Judgment of the ſuperior.

There is a great Abundance of Caſes more, which I ſhall have Occaſion to cite to your Lordſhips, if the actual Fraud of the preſent Sentence ſhould ever be diſputed; Caſes, in which much weaker Grounds of Imputation, than thoſe which occur here, have been thought ſufficient to avoid a Judgment.

But,

But, my Lords, what Arguments have been uſed on the other Side upon this Part of the Caſe?

Firſt, It has been inſinuated, that certain Statutes, made againſt Covin, account for the many Judgments to be found in our Books; and prove, that, without ſuch Statutes, they could not have obtained. But many of the Caſes were before the Statutes referred to. The Principle, avowed by the Judges, is independent of them. They all provide either additional Sanctions againſt Fraud; or new Precautions againſt the Opportunity of practiſing it. And it would be a very miſchievous Conſtruction, if a Statute againſt a particular Fraud were to protect every other.

Secondly, the fraudulent Sentence muſt be ſent back to the Court, where the Fraud was practiſed, in order to be corrected. Why ſo? If the Thing alledged againſt a Sentence were Error, miſ-judging either the Law or the Fact, it muſt be reverſed in the ſame Juriſdiction, original, or appellate. But the Court, in which the Sentence is pleaded, muſt determine on the Reality and Application of that Plea, juſt as it would on any other Matter pleaded. Fraud is a Fact. The Concluſion is, that it puts a total End to the Cauſe. The Court, in which ſuch Cauſe depends, muſt be as competent and perfect a Judge of that Fact, as the Court, in which the Fraud was perpetrated. I ſay as competent and perfect; becauſe the Court, where the Fraud has been practiſed, which has overlooked ſuch Circumſtances as appear on the very Face of theſe Proceedings, does not ſeem to me the very Place to which one would ſend a Queſtion of Colluſion to be tried. All the Authorities referred to before, and the numerous Inſtances of replying Fraud to Pleas of Judgments by other Courts, on which it was practiſed, contradict this Notion. But Caſes are cited on the other Side. *Kenne*'s Caſe, it was ſaid, proves, upon the State of it, that the Sentence was fraudulent. The Bill in the Court of Wards ſtated, that the Sentence was falſe, and with a deal of Aggravation. But who ever referred to an *Engliſh* Bill for the true State of any Caſe? The Queſtion, referred to the Judges, ſays nothing of the Colluſion. The Caſe of *Morris* and *Webber*, in *Moor* 225, was alſo cited to prove, that Colluſion apparent in an Eccleſiaſtical Sentence did not hinder it from concluding in a Court of Common Law. A Man, divorced *propter impotentiam*, married another Woman, and had Children. The laſt Circumſtance, it was ſaid, diſproved the Cauſe of the Divorce; and therefore the Judgment was apparently colluſive. But that Circumſtance did not even prove the Judgment falſe: For one may be *habilis quoad hanc*. The Law preſumes the Children of a Marriage legitimate: But that does not prove the Fact of Generation to any other Purpoſe. If the Ground of the Sentence was falſe, it would not follow that it was colluſive. Colluſion was not even alledged in the Caſe; and conſequently makes no Part of the Judgment. In the ſame Manner they referred to the Appellant's printed Caſe, in this Houſe, in *Hatfield* and *Holfield*, for an Averment, that the Sentence was fraudulent. But there, as it happens, the State of the Caſe diſproves the Colluſion: For *Porter*, the Defendant in the Eccleſiaſtical Court, was in the Appellant's Power. They cited alſo the Caſe of *Prudham* and *Phillips*, from a moſt inaccurate Note in the Margin of *Strange*, 961; who certainly knew nothing of the Caſe he referred to. The Caſe in Truth was this, *Prudham* brought *Aſſumpſit* againſt *Conſtantia Phillips*. She gave Evidence of her Marriage with *Muilman*. *Prudham* produced a Sentence of the Eccleſiaſtical Court, annulling that Marriage, becauſe ſhe was already married to *Delafield*, who was then alive. She ſaid, that Sentence was fraudulent. But the Court, admitting that the Objection would have been good in the Mouth of a Stranger, would not ſuffer her to alledge Fraud in herſelf, for her own Avail. The learned Doctors alſo cited a Caſe of a Lady *Mayo*, and a Mr. *Brown*, in the Prerogative Court. There, a Sentence in a Matrimonial Cauſe being pleaded, the adverſe Party alledged, that it had been obtained by Colluſion. One learned Gentleman ſaid the Allegation was *repelled*; the other that it was *not admitted*. I am informed the laſt is neareſt to accurate; for nothing was done in that Matter. The Cauſe is ſtill depending. The Firſt Argument promiſed all that Length of Erudition, which your Lordſhips were favoured with Yeſterday: In View to which the Judge aſked, whether they had not better agitate the Queſtion of Fraud, where it was committed; an Iſſue, more natural for the Judge to wiſh, than proper for the Court to award. The moſt looſe and unconſidered Notion, eſcaping in any Manner from that able and excellent Judge, ſhould be received with Reſpect; and certainly will. But it is unfair to him to call this his Judgment. If the Queſtion were my own, with the Choice of my Court, I ſhould refer it to his Deciſion.

Thirdly, among other Reaſons againſt holding Plea of the Colluſion before your Lordſhips, they inſiſted, that it was not worth while; their Sentences are ſo open to repeal at the Suit of any Body, that whoever finds them objected, has nothing to complain of, but his own Remiſſneſs. Their Proceedings are ſo frivolous and ineffectual, their Judgments ſo

inconcluſive and harmleſs, that Nullity, however eſtabliſhed, makes no material Difference in them.

Such were their particular Arguments. In a more general Way, they preſſed upon your Lordſhips, with much Earneſtneſs, the Conſideration of the unhappy Caſe, to which they ſaid we would drive the Priſoner. The Sentence has deprived her of all conjugal Claims upon Mr. *Hervey*; and we acknowledge it to be concluſive upon her, while we inſiſt that it is merely void againſt all the Reſt of the World. She is, therefore, according to us, a Wife, only for the Purpoſe of being puniſhed as a Felon. This ſtrange Apology was not inſinuated, in Mitigation of the Puniſhment, or to the Compaſſion of your Lordſhips; but directly and confidently addreſſed to your Juſtice. Do not proceed to try the Crime, becauſe the Purpoſe of committing it is totally fruſtrated; and many other Inconveniencies have enſued. In other Words, the Crime has been detected. Theſe Diſappointments, theſe inconvenient Conſequences of Guilt are the Bars, which God, and the Order of Nature, have ſet againſt it: But they have not been found ſufficient. It demands the Interpoſition of publick Authority, with ſeverer Checks, to reſtrain it. Why is ſhe thus hampered with the Sentence ſhe fabricated? Becauſe ſhe fabricated it: Becauſe Juſtice will not permit her to alledge her own Fraud, for her own Behoof; nor hear her complain of a Wrong done by herſelf.

In ſhort, my Lords, the Motion is wholly inadmiſſible. It is inconſiſtent with all Order and Method of Trial, for us to debate imaginary Topics of Defence, before hearing the Charge; and for the Court to reſolve abſtract Queſtions, upon hypothetical Grounds; is a Sentence pronounced between Two certain Perſons admiſſible Evidence againſt others? Is this Species of Sentence ſo? Is either admiſſible againſt the King—in any publick Proſecution—in this particular Sort of Proſecution? Is ſuch Evidence probable only, or concluſive—againſt the Parties to it—againſt Strangers—againſt the King—and in what Caſes? What, if it were obtained by Colluſion? What, if by her Colluſion? Will it ſerve her? May ſhe offer it ſafely? How much will it prove againſt her? What Evidence will do to prove the Colluſion?—There is no End of ſuch Queſtions. At the ſame Time I was not ſolicitous to prevent any Part of the Argument. Were it poſſible for your Lordſhips to ſtop this Proſecution here, I have no Deſire to wound the Mind of any Perſon, unneceſſarily, or, if ſo painful a Duty may be diſpenſed with. But I have rather wondered to hear ſuch Hopes as theſe thus far encouraged;—or even entertained on the Part of the Priſoner with Confidence enough to make it worth her while to avow, in this Stage of the Buſineſs, that ſhe had rather have every Thing preſumed againſt her, than hear any Thing proved; and to diſcloſe to your Lordſhips, not an Anxiety to clear her injured Innocence, but a Dread of the Enquiry; a Wiſh to ſubmit, in Silence, to the Charge. Was this her Solicitude to bring the Queſtion here? Of what Avail would it be to any Body, in any Condition, to appear in any Court, and defend thus? But, in ſuch a Court, before ſo venerable an Audience, to hear nothing pleaded againſt a Charge of Infamy, but a frivolous Objection to entering upon the Enquiry:—Unleſs Topics ſtronger, more pertinent, and pointed could have been urged, I am exceedingly ſorry, upon every Account, that the Time of your Lordſhips has been thus taken up; and that we did not go directly into the Examination of the Matter before you.

Mr. Solicitor General.

My Lords,

There are two Queſtions at preſent before your Lordſhips; the one turns upon the Effect of a Sentence obtained from the Eccleſiaſtical Court in a Caſe of Jactitation of Marriage, which the Counſel for the Priſoner have maintained to be a concluſive Bar to the Inquiry now inſtituted in a Court of Criminal Juſtice: The other is, whether that Argument ought to be admitted in this Period of the Proceeding.

My Duty requires me in the Firſt Place to ſubmit to your Lordſhips ſome Objections to admitting that Sentence in Anticipation of the Charge, after a Plea of *Not Guilty* to the Indictment.

The Plea, which is the Defence upon the Record, denies the Charge; but the Argument contends, that the Charge ought neither to be ſtated, nor proved. To proceed firſt to conſider the Merits of a Defence without a Charge eſtabliſhed either by Proof or Admiſſion

of the Party, is at leaſt a very great Novelty in a Criminal Proceeding, and a very wide Deviation from the ancient Courſe of Trials; and it is a Preſumption of ſome Weight, that a Mode of Trial, which has prevailed for Ages, is not founded in Folly nor Injuſtice.

In the regular and ordinary Courſe, a Priſoner who has any ſpecial Matter to alledge, which ought to bar the Enquiry into the Crime, muſt ſtate it in the Form of a Plea of the Indictment. Upon the Plea of the Party every Court of Criminal Juriſdiction muſt form a judicial Determination: A Pardon, a former Acquittal for the ſame Charge, are Defences which preclude an Inquiry into the Crime; but the Party can only inſiſt upon ſuch Defences by pleading them, the Court can only take Cognizance of them when pleaded.

The preſent Proceeding would oblige the Court to try the Validity of the Charge, by firſt hearing the Defence; in the Courſe of that Hearing not only the State of the Charge is ſuppoſed, but a Reply to the Defence by new Facts is alſo taken by Suppoſition; and, ſhould ſuch a Method be permitted, your Lordſhips would be placed in a Situation very different from the Exerciſe of judicial Authority; for Courts of Juſtice are not inſtituted to decide a Diſputation upon a Theſis of Law; their Province is to decide upon real Fact, not upon general or hypothetical Propoſitions; nor can they pronounce the Law, till the Facts, from whence that Law ariſes, are firſt eſtabliſhed.

The Counſel for the Priſoner are obliged to ſtate their Argument thus: Suppoſe, ſay they, the Firſt Marriage to have been ſolemnized, but a Suit to have been inſtituted to impeach that Marriage, in that Suit a Sentence pronounced againſt the Marriage; ſuppoſe that Suit and Sentence to have been fraudulent, yet even ſuch a Sentence ought to be concluſive, and to bar all Inquiry into the Crime of a Second Marriage. The only Anſwer, which I ſubmit to your Lordſhips ſuch an Argument at preſent demands, is, that a Court of Juſtice cannot ſuppoſe the Fact of the Marriage, nor the Suit to impeach the Legality of it; no Suppoſition can be formed, whether the Proceeding in that Suit was fraudulent, or was fair, the Sentence real, or colourable; the Parties muſt agree upon the Facts before the Court can be aſked to decide the Law; if they do not admit the Facts upon Record, it remains for both Parties to prove what they think material; then, and not till then, it is the Duty of the Court to pronounce the Law.

No Precedent has been quoted to ſhew, that a ſimilar Proceeding was ever admitted in a Court of Criminal Juriſdiction. One Caſe only was faintly alluded to by the learned Gentleman, who ſpoke Firſt Yeſterday. The Caſe of *Jones* and *Bow*, cited from *Carthew*; where the Reporter ſays, that, "by way of Anticipation to the Evidence that the Plaintiff was "about to give, the Defendant produced a Sentence of the Eccleſiaſtial Court in a Cauſe of "Jactitation, a Debate aroſe upon the Effect of that Sentence, and the Court being of "Opinion that the Sentence was concluſive, the Cauſe between the Parties ended."

That Cauſe was an Action of Ejectment to try the Title to an Eſtate. A Proceeding by Ejectment is well known to be entirely fictitious. In a Suit founded upon a legal Fiction to try a Queſtion of Right, where the Judgment is not concluſive on either Party, there may be no Miſchief in preſſing forward to the Concluſion without an exact Attention to Forms. The Caſe therefore does not prove, that in a Civil Action, where Judgment is given upon the mere Right, ſuch Proceeding could have been allowed: But a Criminal Proceeding requires ſtill more Preciſion than a Civil Suit, and a Deviation from the Forms would very ſeldom be favourable to the Accuſed. If the Priſoner is not confined to the Defence pleaded, neither would the Proſecutor be confined to the Matter of the Charge; the Judge and the Jury would mutually encroach upon each other; nor could there be a more dangerous Source of Error and Confuſion, than to permit a mixed Conſideration of Law and of Fact, of Hypotheſis and of Argument, to be introduced into Criminal Trials. The only Plea to the preſent Indictment is *Not Guilty*. The Argument your Lordſhips have heard, ſuppoſes, that ſuch a Plea ought not to have been put in; that there is a more prudent and cautious Method of Defence, which you are deſired to hear upon Suppoſitions, without the Form or Subſtance of a Plea.

The Counſel for the Proſecution are bound to oppoſe this Experiment. It would ill become them, acting in the Character of a publick Accuſer, to advance any Doctrine which they did not believe to be founded in Law, or to ſuppreſs an Objection to a Proceeding which, as it is novel, cannot paſs into a Precedent without great Danger and Miſchief. Should that Objection prove, that the Argument, which in this Stage of the Buſineſs the Counſel in Defence have been permitted to urge, is inadmiſſible, your Lordſhips will however have no Reaſon to regret the Delay it has occaſioned, nor to deem that Time miſpent, which has

has been employed in the preſent Inquiry, ſince the Object of it, though fruitleſs, has been directed to the Relief of a Party accuſed. Suppoſing then the Debate upon the Effect of the Sentence urged in Bar of the Trial to be proper at this Time, I ſhall proceed to the Conſideration of the Argument.—The Propoſition advanced is this; that in an Indictment upon the Statute of *James* I. for marrying a Second Huſband, living the Firſt, a Sentence of an Eccleſiaſtical Court, in a Cauſe of Jactitation of Marriage, pronouncing, that it does not as yet appear to that Court that there hath been a Firſt Marriage, is a concluſive Evidence that no ſuch Marriage ever was had.

In order to make out this Propoſition, the Counſel contend, Firſt, That it is an univerſal Rule, that the Decrees of Courts, having competent Juriſdiction, bind all Perſons, and conclude in all Caſes, in any Manner touching the Matter decided. Secondly, they maintain, that the Sentence of the Eccleſiaſtical Court in Queſtion is a Deciſion. They urge in the Third Place, that the Rule firſt laid down admits of no Exceptions, but applies with more Force to Criminal, than to Civil Caſes. In the laſt Place they inſiſt, that ſuppoſing this Sentence to be the Effect of Fraud, Colluſion, and Agreement between the Parties to the ſuppoſed Suit in the Spiritual Court, it is notwithſtanding concluſive upon all other Courts, and the Fraud can only be examined in that Court whoſe Juſtice has been thus enſnared.

My Lords, I have ſtated fairly the Argument on the other Side, which reſts on theſe Four Propoſitions, and, were I only engaged in a Diſputation with the learned Gentlemen upon a mere Theſis in Law, I ſhould be inclined by a Denial to inſiſt upon better Proofs, than have been offered in Support of theſe Propoſitions. I feel myſelf however under a very different Impreſſion of Duty as one of the Counſel for the Proſecution. The Priſoner may take every Advantage, that the Law will allow; from us your Lordſhips have a Right to expect every Conceſſion, that Juſtice requires. I ſhall therefore admit (as far as in my Conſcience I think them admiſſible) the ſeveral Propoſitions urged by the oppoſite Side, ſtate with as much Fidelity as I can the true Limitations of the Doctrines advanced, and aſſert no Point but what I hold to be clear Law, ſupported by undoubted Authority.

It is contended, in the Firſt Place, to be a univerſal Rule, that Sentences of Courts of competent Juriſdiction are binding upon all other Judicatures, in which any Inquiry ariſes into the Matter determined: That Propoſition I conceive to be much too largely ſtated. The Rules and Principles that I have learnt upon that Subject, I will very briefly ſubmit to your Lordſhips, not meaning to argue, but only to ſtate them.

It is a general Maxim of Law, that the Sentence of a competent Court binds the Parties, and all Perſons deriving any Right under them; as to Third Perſons, it neither prejudices nor benefits them.

Another Maxim, equally true, is, that a Sentence of a Court having competent Juriſdiction, if it comes collaterally before another Court in another Suit, ſhall be preſumed juſt till the contrary appears. One Court has no Authority to direct the Judgment of another; but it is a fair Preſumption, that what hath been decided, hath been juſtly decided; it is however but a Preſumption, and in moſt Caſes it obtains only till the contrary is proved.

I admit at the ſame Time, that there are Caſes, in which that Preſumption may amount to a Concluſion. Where the Sentence has been pronounced *in Rem*, by a Judicature having a peculiar and excluſive Juriſdiction over the Subject Matter of the Cauſe; the Effect of ſuch a Deciſion is not to be controverted in any other Civil Suit. Theſe Propoſitions are founded in the Conſent of all Lawyers, who have treated of general Law, and are proved by a Series of judicial Authorities; to quote them would lead into an unneceſſary Detail upon a Part of the Argument, which does not immediately apply to the Deciſion of the Point in Queſtion.

The Caſes cited on the other Side agree with the Diſtinction I have mentioned. A Sentence of a Court of Admiralty upon the Forfeiture of a Ship; the Judgment of the Court of Exchequer condemning Goods as forfeited; are each of them concluſive upon this Principle, that the Sentence is *in Rem*, the Court has pronounced upon the Property itſelf. The Caſes quoted of Sentences of an Eccleſiaſtical Court, are all in Matters of which that Court has the peculiar and excluſive Cognizance. The Eccleſiaſtical Court has the ſole Juriſdiction of Caſes teſtamentary, and of Caſes matrimonial, to a certain Effect; if therefore a Queſtion ariſes, who is intitled to the perſonal Eſtate of a Man deceaſed with or without a Teſtament, the Probate of the Will, or a Grant of Adminiſtration, gives the Title to the Property in Queſtion; the Effect of it cannot be conteſted in other Courts collaterally and incidentally, becauſe no other Court has Power to controvert the Act, no other Authority can confer the Title to the Thing in Diſpute. Such Sentences are *in Rem*.

The

The Caſe is very different, where the Deciſion is upon a perſonal Contract, or any Matter ariſing out of the various Civil Relations of Perſons, in which the original Cognizance of the Cauſe might have come before the Court; where that Deciſion is offered as an Evidence of Right, there the Judgment of the foreign Court can only have Effect ſo far as it is juſt; no Authority belongs to it but from its internal Juſtice; for the Court, in which it is produced, owes no Obedience to the Court which pronounced it, and is equally competent to give the Law to the Parties. The Effect of the Sentence is beneficial however for the Party who has obtained it; becauſe the Juſtice of it is preſumed, the Truth of the Facts on which it proceeded is admitted without Proof, and the adverſe Party is obliged to demonſtrate the Falſhood or Iniquity of it.

In Support of this Diſtinction I will only mention to your Lordſhips one Authority of a late Date, which I ſelect from a Multitude of Caſes, not merely becauſe it is a Determination in the laſt Reſort, but becauſe the Rule of Law is ſtated in the Judgment: The Caſe I allude to was decided by your Lordſhips on the 4th of *March* 1771, upon Appeal from the Court of Seſſion in *Scotland*, by *Sinclair* againſt *Fraſer*; the Queſtion there was, What ſhould be the Effect of a Judgment obtained by the Appellanti n *Jamaica*? The Perſon, againſt whom that Judgment was directed, was ſued upon it in *Scotland*; it happened, that the Court of Seſſion refuſed to give any Effect to it, and held the Party bound to prove the Ground, the Nature, the Extent of his Demand: From that Determination an Appeal was taken to your Lordſhips, the Judgment of the Court of Seſſion was reverſed, and the Words of the Order of Reverſal were, "That the Judgment complained of be reverſed," and declare "That the Judgment of the Court of *Jamaica* ought to be received as Evidence *prima* "*facie* of the Debt, and that it lies on the Defendant to impeach the Juſtice of it, or to "ſhew that it was irregularly and unduly obtained."

My Lords, The Authority that I quote to your Lordſhips will have conſiderable Effect in a ſubſequent Part of the Argument: At preſent I only urge it as a Proof, that though in Caſes, where the Sentence is *in Rem*, where the Court has a peculiar and excluſive Juriſdiction to determine the Title to the Thing in Queſtion, the Preſumption in Favour of the Judgment is admitted to be concluſive; yet where the Judgment is applied to perſonal Rights, to Matters of which other Courts have equal Cognizance, the Party againſt whom it is urged is at Liberty to impeach it, to ſhew that it is not juſt, or that it has been irregularly and unduly obtained.

This being the Diſtinction in Civil Caſes, the Queſtion ariſes, how far theſe Rules are applicable to Criminal Suits? What Effect ought the Sentence of any Civil Court to have as a Bar to the Juſtice of the State in the Trial and Puniſhment of Crimes?

The Counſel for the Priſoner argue, That if the Civil Right is deſtroyed by the Sentence of a competent Court, to examine into the Crime is an abſurd Inquiry; where there is no Relation, there is no Duty, and there can be no Breach of it. Is this ſo? Is it then competent to a Party by any Act, deſtructive of the Civil Relation, to aboliſh the Duties of that Relation? Perſons may deprive themſelves of the Benefit of any Civil Right, may diſpenſe with the Advantages of any Relation of Life, may be intitled to claim neither as Wife, Mother, nor Child: But can they abſolve themſelves from the Duties, that belong to the natural Relation? Can they, by their own Act, abſolve themſelves from the ſacred Duties of thoſe Civil Relations, which, in a State of Society, are natural Relations?

My Lords, The Propoſition I contend for is ſo far from abſurd, that the contrary of that Propoſition would involve in it the moſt manifeſt Abſurdity: The Civil Intereſt is important only to the Parties themſelves. Whether an Eſtate belongs to one Perſon or another, whether a Party is intitled to Rank and Diſtinction, to whom related, whoſe Wife ſhe is? The Queſtion is of great Indifference to Society; but if the Eſtate, the Relation, the Rank, is obtained by Criminal Means; if the Situation which a Perſon chuſes to relinquiſh is attended with Duties, the Advantage, but not the Duties, may be waved; the Peace and Order of Society muſt be maintained, and no Violation of them can paſs with Impunity.

If there is an univerſal Propoſition of Law, I take this to be ſo, That no Determination between Party and Party can preclude Publick Juſtice from inquiring into the Criminal Tendency of their Actions; daily Experience proves this in the moſt trivial Inſtances: An Action is brought for an Aſſault, the Party fails in it, there is a Verdict againſt him; it does not prevent a Proſecution by Indictment, upon the very ſame Fact, againſt the very ſame Party: In ſuch an Indictment was it ever pleaded, that an Action had been brought againſt the Party for that alledged Treſpaſs and Beating, and that he had been acquitted upon that Action? The learned and reverend Judges will inform your Lordſhips, that there is not a

Sitting or an Aſſize without ſome Inſtance of this Sort. A Queſtion may ariſe in an Action upon Property, to which of Two Perſons a Thing, an Horſe for Example, belongs; it is decided to belong to *A.* and not to *B.* would that Deciſion bar an Indictment againſt *A.* for ſtealing the Horſe? It is no Anſwer to publick Juſtice, that he has acquired that Property, when the Object of the Criminal Inquiry is, whether he has committed a Crime in acquiring it.

The Propoſition advanced on the other Side, that a Sentence in a Civil Suit is concluſive in a Criminal Proceeding, was not ſo much preſſed upon any Deduction of Argument, as aſſerted on the Authority of a Caſe cited from *Strange*'s Reports; in which it was ſaid to have been determined, that the Grant of the Probate of a Will by the Eccleſiaſtical Court was a Bar to an Indictment for Felony in forging that Will.

In the Firſt Place your Lordſhips will give me Leave to aſk, does it enter into the Imagination of any Lawyer, that the ſame Rule would take Place with Regard to a Will of real Eſtate? Had ſuch a Will been produced in Judgment, the Witneſſes to it examined, the Validity of it canvaſſed, a Judgment in Favour of it, even a Decree of the Court of Chancery eſtabliſhing it, I do preſume it will not be maintained, that all thoſe Proceedings would prevent a Proſecution for the Forgery of that Will. The ſame Thing might happen in the Caſe of a Deed; a Deed may have been eſtabliſhed by a Decree; the Property of an Eſtate ſettled by it, irretrievably perhaps; would there be no Puniſhment for the Crime, if it ſhould be diſcovered afterwards, that that Deed was a manifeſt Forgery? The Eſtate might be held indefeaſibly by the Party who had obtained it; but I do not conceive that his having got Poſſeſſion of that Eſtate, having obtained an Advantage of which human Laws could not deprive him, would be an Anſwer to human Juſtice why he ſhould not be puniſhed for the Crime, by which he had gained that Advantage.

It is ſuppoſed however, that there has been a Deciſion, that a Probate of a Will of perſonal Eſtate bars an Indictment for forging that Will. Is the Grant of a Probate then an Act of ſo high a Nature, requiring ſo much judicial Accuracy, that it is not to be queſtioned? A Probate in common Form is not even a judicial Act, it is merely official; there is no Litigation, no Inquiry; the Conſcience of the Judge is not engaged in it. What is the Purpoſe of forging a Will of perſonal Eſtate? To obtain a Probate; for without it there might be a Criminal Intention, but no Prejudice could ariſe to any Perſon from that Intention; ſhall it be ſaid then, that the Accompliſhment of the Crime is to afford Protection for itſelf? The Authority relied on is a Note in Sir *John Strange*'s Reports, under the Name of *The King* and *Vincent*, that a Perſon being indicted for forging of a Will, upon producing a Probate; a Probate in the common Form was held a Bar to the Proof of the Forgery, and he was by the Judge acquitted. This is the whole Note: It is a great Misfortune that Notes, very often taken upon looſe Information, are given to the World under reſpectable Names. The Collections of a Lawyer, made only for his own Uſe, muſt abound with Errors; in publiſhing ſuch Collections many of theſe will eſcape; and this is not the only Inſtance of Miſtake in that Collection. I conceive it to be impoſſible at any Period, at any Time of the Day, by the Negligence of any Judge who might happen to be preſent at the *Old Bailey*, that a Priſoner could have been acquitted of a Charge of Forgery upon ſuch a Defence. I ſay this with Confidence; becauſe, in the Inquiry that hath been made into the Caſes determined, many have been found, where Parties have been tried and convicted for forging a Will of perſonal Eſtate, and the Evidence to prove the Publication of the forged Will has been the Probate, produced by the Officer of the Court, and his Teſtimony that the Priſoner was the Perſon who obtained the Probate.

Mr. Attorney General quoted to your Lordſhips the Caſe of *The King* and *Murphy*. The Priſoner there had the double Villainy to turn the Charge upon his Proſecutor; the Trial was attended by Counſel who do not uſually go to the *Old Bailey*; it is ſtated very fully by a Short-hand Writer at the End of the State Trials. The Caſe of *The King* and *Sterling* was alſo mentioned; it is very manifeſt that that unfortunate Perſon was unjuſtly hanged, if the Caſe in *Strange* is Law. *Sterling*'s Caſe was this; he was indicted for having forged a Will, of which Will he had obtained a Probate, and under that Title had transferred ſome Stock; the Perſon whoſe Will he ſaid it was, was alive, and produced as the Witneſs againſt him, and of courſe to impeach the Probate of her own Will: Abſurd as it may ſeem to doubt whether that Evidence was competent, if the Caſe of *The King* and *Vincent* was Law, undoubtedly that Witneſs ought not to have been permitted to prove her own Exiſtence; ſhe was dead by irrefragable legal Argument; but the Event was different, and Mr. *Sterling*, notwithſtanding the Probate, ſuffered for his Crime.

Beſides theſe Caſes, there was another in no very remote Period, in which a Party was tried for the Forgery of a Will, in *September* Seſſions 1765, at the *Old Bailey*. One *Richardſon* and one *Carr* were indicted for having forged a Receipt for the Payment of Money, with Intent to defraud a particular Perſon, who was a Seaman, intitled to Wages; the common Caſes of Forgery of Wills have been in the Caſe of Seamen. Upon the Trial it appeared that the Receipt was given in the Name of *Jane Steward*, who was the ſuppoſed Executrix of a Will of this Seaman, which had been proved by the Defendant *Carr*, upon the Oath of the other Defendant *Richardſon*: The learned Judge, Mr. Baron *Perrot*, who tried them, was of Opinion that the Priſoners ought to be acquitted of the Charge of forging a Receipt for the Money; but, being ſatisfied from the Evidence, that *Richardſon* had forged the Will, notwithſtanding it had appeared in the Trial before him, that a Probate had been granted of that Will, he remanded *Richardſon* to Gaol to take his Trial for the Forgery of the Will. *Richardſon* was accordingly tried in *October* Seſſions 1765, for forging the Will of *John Steward*, a Mariner: The Officer of the Prerogative Court proved upon that Trial, that the Will was brought to his Office by *Richardſon*, and a Probate of that Will granted; and upon that Proof he was convicted, and executed. The Firſt learned Judge had remanded him to Priſon to take his Trial at the enſuing Seſſions for the Forgery of a Will, the Probate of which was then in Court; and upon the Second Indictment, which was tried by the noble Lord who preſides in the Court of King's Bench, the Priſoner was convicted notwithſtanding the Will had been proved. Other Caſes have been mentioned to your Lordſhips to the ſame Effect with theſe, which ſufficiently refute that ſingular Caſe of *The King* and *Vincent*, the only Authority to ſupport the Argument, that the Sentence of an Eccleſiaſtical Court is a Bar to an Indictment.

Having thus removed the only Obſtacle to the Propoſition I meant to rely upon, that in a Criminal Matter a Sentence of a Civil Court ought not to be concluſive againſt a publick Accuſation, I now proceed to a more limited and cloſe Enquiry, what Effect the Sentence of Jactitation ought to have in this Proceeding, an Indictment for Bigamy?

It is of no Importance to the preſent Enquiry to inveſtigate, by what Means the Cognizance of Cauſes matrimonial and teſtamentary belongs not to the Sovereign of the State, but is given to an Order of Men, dedicated to the Service of Religion. The Fact is, that in the Juriſprudence of this Country, Cauſes matrimonial and teſtamentary are of Eccleſiaſtical Cognizance. The Right to try them is not derived from the King as the Fountain of Juſtice, nor exerciſed by the King's Court; but wherever the royal Authority interpoſes, it is not as Sovereign of the State, but as ſupreme Head of the Church. The Law did not even interfere to puniſh the Violation of the matrimonial Rights, and Adultery, which in moſt Countries of *Europe* is treated as a Crime, but was not conſidered in *England* as an Offence puniſhable by the Magiſtrate, but left to the Correction of Eccleſiaſtical Cenſure. At length however the Violation of conjugal Duty, accompanied with the Circumſtance of an open Attack upon the Order of Society, by a Second Marriage, was, by ſpecial Statute, made a Crime: When I ſay made a Crime, I do not mean it was made more immoral; but it was made a Subject of Criminal Cognizance by the Magiſtrate. The learned Counſel, who ſpoke Second Yeſterday contended, that this Statute gave no Juriſdiction to the Temporal Courts to pronounce upon the Legality of the Marriage; but that the Juriſdiction of the Eccleſiaſtical Court, as to the Trial of the Marriage, remained ſtill abſolute. It was neceſſary for his Cauſe to attempt this Argument; but to maintain this Propoſition is a very difficult Taſk. The Legiſlature, Fifty Years after the Reformation, has declared that the Crime of Bigamy ſhall be puniſhable as a Felony by the Magiſtrate. To convict a Perſon of that Crime, muſt not the Magiſtrate try him? Has he not the Power to acquit or condemn him? Has he only an Authority to inflict the Puniſhment, as in old Times, when the Church delivered over the Offender to the ſecular Arm? and is the Sentence of the Spiritual Court to guide the Conſcience of the Judge and Jury in the Criminal Court? The Sentence of the Eccleſiaſtical Court in the preſent Caſe is ſaid to be againſt the Firſt Marriage, and therefore it is urged the Priſoner ought to be protected by it; but, if the Argument is juſt, it muſt hold equally, where the Sentence is for the Marriage; it ſounds leſs harſh to contend that a Party, declared not to be married in the Firſt Inſtance by the Spiritual Court, ſhall not be queſtioned for the Second Marriage. But by the ſame Rule we muſt conclude, that if the Spiritual Court had determined for the Marriage in the Firſt Inſtance, and the Fact of a Second Marriage had been proved, it would not have been competent for the Priſoner in an Indictment for Bigamy, ſo circumſtanced, to have made any Defence; he is concluded by the Sentence, the Judge and Jury are bound to believe it, and, upon that Sentence, without Examination, to convict and to puniſh.

The Effect of the Statute I take to be very different; it has created a new Offence, and for the Trial of that Offence the Cognizance of the Lawfulneſs of Marriage is given to the Temporal Courts. As to all Criminal Conſequences that Court has Cognizance to determine as well as the Eccleſiaſtical Court, what is and what is not a legal Marriage between the Parties. That it has ſo the Caſe of *Boyle* and *Boyle*, quoted to your Lordſhips for another Purpoſe, is a clear Proof: That was a Prohibition iſſued to the Eccleſiaſtical Court to enter into an Examination into that Cauſe of Marriage, which the Court, in trying the Indictment, had determined. The other Caſe mentioned by the learned Doctor is to the ſame Effect. The Two Caſes differ only in this, that in one the Party was convicted, in the other acquitted; but the Court was of Opinion in both, that the Eccleſiaſtical Court could not interfere.

It is unneceſſary however to have Recourſe to Authorities, for the Statute itſelf has decided this Queſtion. The Legiſlature ſeems to have had it in View, that a Juriſdiction being newly given to the Temporal Courts in the Trial of Marriage, Queſtions might ariſe, as between concurrent Juriſdictions, what ſhould be the Effect of Sentences pronounced by the Eccleſiaſtical Court. It was a wiſe Foreſight in thoſe who compiled the Statute, to define in what Caſes the Sentences of the Eccleſiaſtical Courts ought to preclude any Enquiry for the Crime; and it is defined in the Words of the Exception, "That this Act ſhall not extend to any Perſons divorced by the Sentence of the Eccleſiaſtical Court, nor to any Perſons where the former Marriage has been by the Eccleſiaſtical Court declared void and null." There are Two Caſes then put by the Statute, in which the Sentence of the Eccleſiaſtical Court protects the Party againſt a Criminal Inquiry; Sentence of Divorce, and Sentence of Nullity of Marriage: If therefore the Eccleſiaſtical Court, having competent Juriſdiction, has either divorced the Parties, or if it has pronounced Sentence of Nullity of Marriage, the Sentence in theſe Two Inſtances is concluſive: But the Statute has no Exception in Favour of a Sentence in a Cauſe of Jactitation. There is no Pretence to argue, that a Sentence in a Cauſe of Jactitation is either a Sentence of Divorce, or that Sentence which makes the Marriage void and of no Effect: No Lawyer, no Civilian can make that Miſtake. What then does the Exception prove? Two Sentences of the Eccleſiaſtical Court are recited in it, the Third is omitted; and it is a general Rule of Law, that wherever a Statute excepts particular Caſes, the Exception of thoſe Caſes extends the Statute to all Caſes not excepted. That Propoſition is too clear to require Authorities to be cited in Support of it. The Law therefore, which ſays the Trial of Polygamy ſhall proceed in all Caſes, except where a Sentence of Divorce, and except where a Sentence of Nullity of Marriage has intervened, does virtually ſay, that a Sentence in a Cauſe of Jactitation of Marriage, which is neither of Divorce nor of Nullity, ſhall not bar the Trial. I conceive therefore the Statute to have decided this Queſtion.

The Argument on the other Side is put in a more plauſible Form by ſtating the Defence to be founded upon a Fact, of which the Sentence of the Eccleſiaſtical Court is the beſt Evidence: There can be no double Marriage, it is ſaid, becauſe the Sentence diſproves the Firſt Marriage. This Mode of ſtating the Argument makes it neceſſary to examine the Nature of a Suit for Jactitation of Marriage, in order to ſee what Credit is due to the Sentence, when offered as Evidence to diſprove the Firſt Marriage.

A Suit for Jactitation of Marriage is, from Beginning to End, totally ſingular. Some Writers on the Canon Law derive its Origin from the Doctrine of Pre-contracts, which, by the Eccleſiaſtical Law, conſtituted a Marriage: And till that very miſchievous Prejudice was deſtroyed by the late Marriage Act, it is not ſurprizing that any Attempt to leſſen the Evil ſhould meet with Encouragement. The Form of the Suit is this: The ſuppoſed Huſband or Wife complains to the Eccleſiaſtical Judge, that he or ſhe is a Perſon free from all Matrimonial Contracts or Engagements with the adverſe Party, and ſo eſteemed by all Neighbours, Friends, and Acquaintance; that the adverſe Party, notwithſtanding the Knowledge of this, has falſely and maliciouſly boaſted of a Marriage with the Party complaining; it concludes then by ſuch falſe Aſſertions an Injury is committed, and prays that Right may be done by declaring the Party free from all Matrimonial Engagements with the other, and by enjoining that Party perpetual Silence. The Party Defendant may either ſay, I have not boaſted, I deny that Fact; or, if he admits that he has boaſted, he is then to go on and alledge circumſtantially a Marriage, which the other Party denies, under the Circumſtances alledged. If the Marriage is not proved, then the Court pronounces, That, ſo far as yet appears, the Party complaining is free from Matrimonial Contract with the other Party, and enjoins perpetual Silence.

After this Sentence, ſo gravely pronounced, your Lordſhips are told by all the learned Doctors, and all the Books of Practice agree, that this Injunction of perpetual Silence continues no longer, than till the Party chuſes to talk again; and the Perſon, to whom he may with the moſt perfect Safety repeat his Aſſertions, is the Judge who enjoined him Silence; for, it is agreed on all Hands, that the Party may at any Time inform the Court, that though it did not appear formerly that he was married, he can make it appear now; and ſuch Proof is admiſſible.

The Forms of all Courts had probably a good Original, and this Suit may have been introduced to prevent a greater Miſchief; but it is impoſſible to avoid Colluſion in ſuch a Proceeding, which has no avowed Object, but to correct the Indiſcretion of a ſuppoſed Diſcourſe; and which, as the learned Doctors on the other Side truly ſtate, has no Termination; and between the Parties themſelves never obtains the beſt Effect of a Judgment, to put an End to Litigation. In modern Times ſuch Suits have ſeldom been commenced but to favour ſome indirect Purpoſe; and were the Sentences allowed to have the Effect that is now contended for, were they to be a Bar to all Criminal Enquiry, it might be expected that Suits, which, as the learned Doctors ſtate, may be carried on without End, would very frequently ſpring up.

Nothing can be further from the Temper of my Mind upon the preſent Occaſion, than to uſe a ludicrous Argument; but when the uncontroulable Effect of ſuch Sentences as theſe, ſo contrived and framed for Fraud, was urged Yeſterday; and while, to leſſen the Objection to them, it was gravely argued, that no great Miſchief could happen from the Deciſion, becauſe you may reverſe this Sentence To-morrow, that the next Day, and a Third after that, and that the Suit was in its Nature eternal; an ingenious Perſon among the Byſtanders was calculating, how many Wives, a Man that had a Taſte for Polygamy, might marry with Impunity: And I think he made it out, according to the probable Duration of ſuch a Suit, that a Man between Twenty-one and Thirty-five might, with good Induſtry, marry Seventy-five Wives by Sentences of the Eccleſiaſtical Court, each Sentence ſtanding good till reverſed, and all reverſible by that Judicature.

My Lords, The Argument is ſerious, though it preſents a ludicrous Idea; for One Conſequence would probably attend a Deciſion in Support of the Authority of ſuch a Sentence. The Marriage Act put an End to that terrible Diſgrace of a civilized Country, *Fleet* Marriages: While they ſubſiſted, it was a common Practice for indigent Women of eaſy Virtue to get a *Fleet* Huſband to protect them from their Debts. If a Sentence of the Eccleſiaſtical Court is to have Effect againſt all but the Parties, a Cauſe of Jactitation will ſupply the Place of a *Fleet* Marriage, and furniſh an Huſband by Sentence, whom the Lady may remove whenever he proves inconvenient. This is but One Inſtance, and in the loweſt Claſs of the Evils, that would follow from allowing ſuch Sentences to be interpoſed againſt publick Juſtice, or the Rights of Third Perſons. What Guard can there be againſt uncertain Iſſue, uncertain Rank, and all the numerous Miſchiefs, that ariſe from Doubt and Colluſion, introduced in the Relations, that form the Bonds of Society?

Were all Conſiderations of the Conſequences attending ſuch a Deciſion to be laid aſide, the very Form of the Sentence argues againſt its being concluſive. What ſays the Eccleſiaſtical Court in that Sentence? "As far as *yet* appears no Marriage is proved." The Verdict upon an Indictment will ſay "It does *now* appear, that a Marriage is proved." The Two Propoſitions do not claſh with each other; there is no Contradiction in them: To the Party it is ſaid, you have not proved the Marriage; a publick Accuſer does prove the Marriage; the Juſtice of the Country has brought out the Evidence of that Fact, which the Party either did not incline, or was not able, to produce. There is no Repugnance in the different Propoſitions, no Incongruity in ſuppoſing that the Sentence may ſtand as between the Parties, and yet ſhall have no Concluſion either as to the Publick, or as to Third Perſons.

The Argument in Favour of the Sentence was ſupported by this Dilemma. What becomes of this Sentence, if the Indictment for Bigamy goes on? Is it null, or has it any Effect? Is the Party a Wife, or no Wife? I anſwer, to all Civil Effects no Wife, the Party has bereaved herſelf of any Right to Benefit by the Relation; to all Criminal Effects a Wife, becauſe that Relation, the Duties conſequent upon it, and the Reſponſibility for the Breach of thoſe Duties, cannot be deſtroyed by the Act of the Party. I could quote to your Lordſhips other Caſes, where the Party takes no Benefit from his Act, where he holds the Situation only to make himſelf amenable to the Juſtice of his Country. I refer to a known Caſe; a Man had committed an Act of Bankruptcy by Colluſion with a Creditor, and a Commiſſion of Bankruptcy was taken out againſt him, the Object of which was, to procure

cure a Diſcharge from his Debts. He choſe to conceal a Part of his Effects, for which he was indicted upon the Statute making it a capital Felony for a Bankrupt to be guilty of any wilful Concealment; it came out clear as the Light, that he was no Bankrupt, that is, no Bankrupt to any Civil Effect; he could not avail himſelf of that Commiſſion of Bankruptcy againſt any Creditor, that had a Mind to diſpute it, except the Creditor who had colluded with him; but though he was in Fact no Bankrupt, he was tried and convicted as ſuch.

My Lords, After the Indulgence, with which your Lordſhips have been ſo good as to hear me ſo long upon this Subject, I am ſorry to be obliged ſtill to treſpaſs a little longer upon your Patience, when I conſider the Fourth Propoſition, which certainly is not the leaſt material; that is, that a Sentence, infected with Fraud, to which Colluſion may be objected, is no Bar in any Cauſe. My Lords, upon that Head the Principle is ſo plain, that the Illuſtration of it will not run into much Length, and the Authorities are ſo deciſive, that I ſhall only ſtate, and not argue upon them.

A Sentence obtained by Fraud and Colluſion is no Sentence. What is a Sentence? It is not an Inſtrument with a Bit of Wax and the Seal of a Court put to it; it is not an Inſtrument with the Signature of a Perſon calling himſelf a Regiſter; it is not ſuch a Quantity of Ink beſtowed upon ſuch a Quantity of ſtamped Paper: A Sentence is a judicial Determination of a Cauſe agitated between real Parties, upon which a real Intereſt has been ſettled: In order to make a Sentence, there muſt be a real Intereſt, a real Argument, a real Proſecution, a real Defence, a real Deciſion. Of all theſe Requiſites not One takes Place in the Caſe of a fraudulent and colluſive Suit: There is no Judge; but a Perſon, inveſted with the Enſigns of a judicial Office, is miſemployed in liſtening to a fictitious Cauſe propoſed to him: There is no Party litigating, there is no Party Defendant, no real Intereſt brought into Queſtion; and to uſe the Words of a very ſenſible Civilian on this Point, *Fabula, non Judicium, hoc eſt; in ſcena, non in foro, res agitur.*

The Ground then, upon which I contend, that a colluſive Sentence is no Bar, is ſhortly this; that ſuch a Sentence is a mere Nullity. But it is inſiſted, that the Court which pronounced the Sentence can alone declare the Nullity of it, and till repealed, it muſt ſtand good and valid. The Authorities, to which I mean to refer upon this Head, will refute that Argument, at the ſame Time that they prove the general Doctrine.

The Firſt is my Lord *Coke*'s Reaſoning in *Fermor*'s Caſe, 3 *Coke* 77: He concludes the Reſolution of the Caſe in this Manner, "Thereupon it was concluded, that if a Re-"covery in Dower or other real Action, if a Remitter to a Feme Covert or an Infant, if "a Warranty, if a Sale in Market overt, if Letters Patent of the King, if Preſentations and "Admittances, that is to ſay, if all Acts Temporal and Spiritual ſhould be avoided by "Covin, for the ſame Reaſon a Fine in the principal Caſe levied by Fraud and Covin ſhall "not bind." Nothing can be more explicit than theſe Words to ſhew, that there is no Neceſſity that the Covin ſhould be proſecuted in the Court in which the Judgment was obtained. The Caſe of *Lloyd* and *Maddocks* in *Moore* 917, is a direct and a plain Authority; there a fraudulent Judgment was ſet up againſt a Plea of a Legatee in the Spiritual Court; the Queſtion in the Court of King's Bench was, whether the Spiritual Court ſhould be prohibited to enter into the Conſideration of the Fraud of the Judgment, which is certainly not a Matter of Eccleſiaſtical Cognizance; but the Court was of Opinion, that the Covin was aptly examinable in a Court Chriſtian to that Effect, and therefore the Prohibition was denied.

My Lords, The other Authorities are more modern, though not more deciſive upon the Point than this. The Firſt I mention to your Lordſhips is the Caſe of *Prudam* and *Phillips*: There is a very bad and a very inaccurate Note of it in Sir *John Strange*: The Note, from which I cite it, is a Manuſcript Note of Mr. *Ford*. In that Caſe it was determined by Lord Chief Juſtice *Willes*, that a fraudulent and colluſive Sentence againſt Mrs. *Conſtantia Phillips* was binding upon her, but he concludes it was binding upon no other Party; the Fraud was a Matter of Fact, which if uſed in obtaining Judgment was a Deceit upon the Court, a Fraud upon Strangers, who as they could not come in to reverſe it, they could only alledge it was fraudulent. He ſaid in that Caſe, that any Creditor of hers might reply that it was fraudulent, and avoid the Effect of it. The other Caſes I refer to are, my Lord *Hardwicke*'s Authority in the Caſe of *Roach* and *Garvin*, 1ſt *Vezey* 159; and in the Caſe of *Brownſword* and *Edwards*, 2d *Vezey* 246. In the Caſe of *Roach* and *Garvin*, the Queſtion was upon the Effect of a Marriage, ſaid to be eſtabliſhed by the Sentence of a Court in *France*: Lord *Hardwicke* enters into the Conſideration of it thus, "The Queſ-"tion is, whether this is a proper Sentence, in a proper Cauſe, and between proper *Parties*; "whether a Marriage is had in Fact, or any Contract *in præſenti*, as a Sentence in the Ec-

" cleſiaſtical Court would be concluſive, unleſs there be Colluſion, which would overturn " the Whole." In the other Caſe the Ground is exactly the ſame.

From theſe Caſes I conclude it to have been the uniform Opinion of all the great Judges, who ſat in *Weſtminſter-hall* from the Time of Lord *Coke* down to the preſent Time (and the Courts were never more ably filled) that Fraud and Colluſion not only vitiates, but abſolutely annuls; and that a Sentence obtained by Fraud is, literally, no Sentence at all; therefore the Objection of ſuch an Inſtrument, of ſo much Paper and Writing, is the Objection of a mere Nullity, and can have no Effect neither in a Civil nor in a Criminal Suit. Having troubled your Lordſhips ſo very long, I will take up no more of your Time, even to recapitulate the Heads of the Argument, but haſten to return my humble Thanks for the great Indulgence I have already experienced.

Mr. Dunning.

My Lords,

I purpoſe to give your Lordſhips very little Trouble; indeed I ſhould be without an Apology, if I had thought of giving you much, finding, in the Station which I hold in this Cauſe, the Subject completely exhauſted; and I cannot but ſuppoſe your Lordſhips Attention in a great Meaſure tired, notwithſtanding the occaſional Relief which the entertaining Parts of the Cauſe have afforded, has given you. I have the leſs Inclination to give your Lordſhips much Trouble, as I feel a Degree of Surprize, that it ſhould have been thought neceſſary for the Counſel on the Part of the Proſecution to give your Lordſhips any.

My Lords, The Subject for immediate Conſideration is the Competeny of obtruding this Sentence, in this Stage of the Cauſe, to ſtop the Cauſe here, and to require of your Lordſhips to decide it without any regard to the Truth or the Juſtice of the Caſe; ſuch however it is contended is the Effect of this Paper, that is offered to your Lordſhips under the Name of a Sentence of the Eccleſiaſtical Court.

The Novelty of the Attempt it is not my Intention to expatiate upon: It has been truly obſerved to your Lordſhips, that ſome Prejudice at leaſt may be expected in the Minds of your Lordſhips againſt an Attempt ſo novel; for though I am not ſo blind an Admirer of Antiquity as to take for granted, that every Thing that is new is therefore wrong; ſure I am, I am warranted in expecting your Lordſhips Concurrence in thinking, that thoſe, who propoſe at this Time of Day to introduce into the Judicature of this Country a new Practice, ought to be prepared with ſuch Reaſons as ſhould compel your Lordſhips Aſſent. This I think may be fairly inſiſted upon the Head of Novelty.

My Lords, The Gentlemen undertake to maintain, firſt, that this Evidence is competent and admiſſible; ſecondly, that it is concluſive; and thirdly, they inſiſt on this Concluſion, not only upon the Suppoſition, that it is a Sentence fairly obtained between real Parties, after an adverſe Agitation of the Queſtion, which it is ſuppoſed to have decided; but though all theſe Circumſtances ſhould be totally wanting, and though the contrary of them all ſhould be the Truth of the Caſe, the Sentence is inſiſted on as equally concluſive. In that Extent it is, that the Gentlemen have undertaken to maintain this Propoſition; and a very conſiderable Taſk it ſeems to me they have undertaken. My Lords, I conſider the Sentence as read only *de bene eſſe*, merely that your Lordſhips may know what the Contents of it are, that you may have the Aſſiſtance of that Knowledge in judging not only of the ultimate Effect of it, but of the Propriety of receiving it at all in this Stage of the Buſineſs. At the firſt Bluſh to be ſure it ſeems a little abſurd, that your Lordſhips ſhould be to decide the Cauſe before you have the ſmalleſt Knowledge of what the Caſe is, that is to be ſtated upon the Part of the Proſecution. It is certainly neceſſary for thoſe that are to judge of this Paper, to know what it is; it is a Sentence in a Court, of which your Lordſhips heard Yeſterday abundant Commendation. It was obſervable, that thoſe, who were moſt laviſh in that Commendation, were leaſt acquainted with the Practice of that Court. The Firſt of the learned Doctors ſpoke with a very becoming Modeſty of the Court in which he practiſes. The other explained to your Lordſhips the Nature of a Jactitation Suit as concluding nothing, being to be revived at any Time, and conſequently having no End. It was contended by all the Gentlemen, that this Court was entitled not only to what on the Part of the Proſecutor we ſhould have had no Difficulty perhaps to have admitted, to Co-equality with the Courts of Temporal Juriſdiction, but to ſomething ſuperior: It was contended, that there was ſomething in the Nature of this Subject that made it peculiarly the Province of that Court to judge of and to decide upon; not that they have better

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Means of Information, not that they have better Rules of Deciſion; but from ſomething unexplained in the Conſtitution of the Court, it was rather aſſumed than attempted to be proved, that to that Court excluſively belong Matrimonial Queſtions, Queſtions on the Rights of Marriage, and even of the Facts of Marriage. I am perſuaded your Lordſhips all go before me in feeling a Conviction, that there is not in that Extent a Foundation for that Claim: Yet this Peculiarity of Juriſdiction, and the conſequential Neceſſity, in order to get rid of the Sentence, to reſort again to that Juriſdiction appeared to me to be the Points principally inſiſted on: Neither of them, I truſt, your Lordſhips will think are made out at preſent. I am conſidering the firſt; that to certain Purpoſes, and with a View to certain Conſequences, the Spiritual Court is the only Court in which Queſtions of Matrimony can be agitated, is moſt true. There alone it is, that the Party deprived of, and complaining of the Want of, Conjugal Rights, muſt reſort to ſeek them: There it is, where the Party ſuppoſed to be injured by a falſe Claim of a Marriage, when none exiſts, can obtain Redreſs for that Injury: But to other Purpoſes, and various are thoſe Purpoſes in which the Queſtion of Marriage ariſes, whether it is to be examined into with a View to Temporal or Spiritual Advantages, whether it is to be examined into with a View to Rights derived from it, or Puniſhments for Crimes committed in Relation to it, to the Temporal and not to the Spiritual Courts belongs, I conceive, this Queſtion of Marriage. My Lords, to ſuppoſe otherwiſe, would be to deny in Fact, that your Lordſhips ſit here with any Juriſdiction at all; for if it were true in the Extent in which it was contended, that to the Spiritual Court excluſively belongs the Conſideration and Deciſion of the Queſtion, Marriage or no Marriage, it will follow by a neceſſary Conſequence, that if there were no ſuch Sentence as the preſent to be thruſt in our Way, and to create this temporary Difficulty, for ſuch I truſt it will prove to be, if there had been no Deciſion in the Spiritual Court at all, your Lordſhips would only have been in the Poſſeſſion of this Cauſe for the Purpoſe of Writing to the Biſhop to know how the Fact ſtood, and from his Certificate to take your Ideas of the Queſtion which you are to decide upon. The Gentlemen muſt maintain not only that there was not at the Common Law any Thing like a Juriſdiction, but that this Statute, which means in Terms to give a Juriſdiction, has not in Point of Effect given any. I am at a Loſs to find a Way, conſiſtent with what the Gentlemen have maintained, to deliver them from that Conſequence: If they inſiſt, that no Temporal Court has a Power to enquire into a Queſtion of Marriage, it will go to that Extent. They have made a Diſtinction between thoſe Caſes, in which the Queſtion is the Point of the Cauſe, and in which it ariſes incidentally. The Queſtion does not ariſe at all, unleſs it ariſes materially; if there be any Thing in the Diſtinction, let us ſee a little how it will help this Argument. Was the Marriage the Giſt of this Cauſe in the Spiritual Court? No: The Lady applies to the Spiritual Court, aſſuming that there was no Marriage, complaining of an Injury, which conſiſts in the Circumſtance of a Man who was not her Huſband taking to himſelf and boaſting (as a Man would be apt to boaſt in ſuch Circumſtances) of the Honour of bearing that Relation to her.

This Cauſe is not in its Nature a Queſtion of Marriage, but of Defamation: If that, which the Lady ſuggeſted, had been admitted to be the Truth of the Caſe, he would have been to excuſe or extenuate his Offence, juſt as the Nature of his Caſe would enable him to do, by either denying that he had boaſted, or ſtating what had led him into it: But this Defendant ſays, No: I have held that Language, which you call boaſting: I will not diſpute with you the Propriety of that Appellation: I have called this Lady my Wife; becauſe, whether it be my good or ill Fortune, ſhe is my Wife. It is for that Reaſon, and that Reaſon alone, that I have held this Language, which is imputed to me as a Crime: I am no Criminal in holding this Language, for that is my Situation, and this is my Defence. Thus it is, that the Queſtion of Marriage is introduced into the Cauſe; it is inſiſted upon as a Defence; as a Matter material to her Defence it is that the Queſtion of Marriage in this Cauſe ariſes. Is it leſs incidental or more direct than the ſame Queſtion ariſing in the ordinary Way, in which it ariſes in Temporal Courts? A Perſon, claiming to be the legitimate Son of his Father, commences an Ejectment, in which the Queſtion of Legitimacy turns out to be the only Queſtion in the Cauſe; it is eſſential to his ſupporting his Claim, that the Court, who are to judge of it, and the Jury that are to decide upon it, ſhould be ſatisfied of the Facts, that the Claimant is the eldeſt and the legitimate Son of the Father. The Point of Marriage is not the Point of the Suit directly, immediately, oſtenſibly, and upon the Face of the Record in that Cauſe, but incidentally, materially, and neceſſarily that Point becomes a Point in the Cauſe. Juſt thus in my Apprehenſion this Cauſe ſtands; and, as applied to this Cauſe, the Gentlemen cannot avail them-

themſelves of the Diſtinction between the Juriſdiction to be exerciſed incidentally, and to be exerciſed directly, upon the Subject of Marriage. One of the learned Doctors repreſented his Ideas of this Juriſdiction exerciſed in the Spiritual Court, as if it was a Juriſdiction to decide upon an abſtract Queſtion. I am perſuaded the learned Doctor in the Uſe of that Word meant only to ſay, that in their Forms of Proceeding, and in ſome of thoſe Cauſes which are inſtituted in their Courts, the Right of Marriage, in Contradiſtinction to the Fact of Marriage, was more immediately pertinent than in ſome of the Proceedings in Temporal Courts; which to be ſure it is. In any other Senſe of the Word the learned Doctor uſed it inaccurately; for that Court, any more than this or any Court, has no Juriſdiction to try abſtract Queſtions of any Sort: No Queſtion ought to be agitated in any Court whatever, unleſs it be a real Queſtion ſpringing from a real Intereſt, and between real Parties. To agitate any other Queſtion is an Inſult to the Court. There is a Senſe in which the Court may be ſaid to have agitated this, in the Nature of an abſtract Queſtion; for it is certainly true, if our Inſtructions have any Foundation in Truth, no one Circumſtance of the actual Caſe of the Parties was before the Court, or made any Part of their Enquiry. I truſt, I ſhall be thought to have done enough at leaſt for the Eccleſiaſtical Court in admitting, that their Sentences are equal to our Judgments; that they are not entitled to more, I may ſafely contend, when I am admitting, that they are entitled to as much Attention as is due to a Decree of a Court of Equity or a Judgment of a Court of Law. In ſuch an Admiſſion, at one Time I ſhould have been thought to have gone much too far: I truſt, the learned Doctors will forgive me, if I cannot carry my Civility any farther. God be thanked we live at a Time, when a better Underſtanding of the Subject, and a more liberal Way of thinking upon every Subject, has ſo far aboliſhed the antient Differences between the different Judicatures in this Country, that we and the learned Doctors may meet together without quarrelling. Their Proceedings in Caſes in which it is competent to them to proceed, deſerve the ſame Attention and Faith as thoſe of Temporal Courts. This appears to me to reduce the Claim, upon the Part of thoſe that are to ſupport this Sentence, preciſely to this Situation; and it is impoſſible to carry it one Jot further: It is an Opinion of a Court, not having ſuperior or excluſive, but having a concurrent Juriſdiction of this Queſtion; having competent Power to decide, and having no Powers to exclude another Deciſion elſewhere, where, for other Purpoſes, Criminal or Civil, it may come to be diſcuſſed, according to the Forms which thoſe different Judicatures uſually obſerve in their Proceedings, totally unobſtructed or aſſiſted by any Attention to what has paſſed in any other Judicature: This, I truſt, will be your Lordſhips Judgment upon the Queſtion agitated between us, if it ſhould be material.

My Lords, I laid in my Claim to object to the Admiſſibility of this Piece of Evidence, upon which, if I ſhould have the good Fortune to have your Lordſhips Concurrence, the ſubſequent Conſideration of the Effects of it, if admitted, will become totally immaterial. I deny, that this is admiſſible in a Court like this; a Court of the higheſt criminal Juriſdiction in this Country.

My Lords, It is ſo familiar, that it would be impertinent to that Part of the Court to which I have the Honour to addreſs myſelf, which is more particularly converſant in the Forms of Proceeding in Courts of Juſtice, to be labouring to prove, that when a Subject is examined into in the Courſe of a Criminal Enquiry, under the Form of an Indictment, or of an Information, what has paſſed or may paſs in the Courſe of a Civil Enquiry upon the ſame Subject and the ſame Queſtion, is not only not regarded, but is not admitted. In the Inſtance that was put, and many others that may occur to ſome of your Lordſhips, it is perfectly notorious, and therefore neither requires Argument nor Proof, that the Practice is certainly ſo. Let a Man be acquitted in a Court of Criminal Juriſdiction, it does not preclude a Party, complaining of an Injury ariſing from that Act, which in a Criminal Court has been preſented as a Crime, from ſeeking Redreſs for the the Civil Injury; and *vice verſa*, the Fate of ſuch an Action cannot be enquired into, much leſs cannot it preclude the Proceedings in a ſubſequent Criminal Enquiry, taking its Riſe from the ſame Act. It has been enquired into in a Court of one Deſcription, it is now enquiring into in a Court of another Deſcription.

My Lords, One Reaſon (there are others, but) one Reaſon why Courts of Criminal Juriſdiction do not admit any Account of what has paſſed upon the Agitation of the Queſtion in a Court of Civil Juriſdiction may be, the Liability to Fraud and Colluſion. I am not now arguing upon the Fact of Colluſion in this Caſe: But it is obvious that if this would do, if the Sentence of a Court of ſuch Juriſdiction, whether Eccleſiaſtical or Temporal, will preclude a Criminal Enquiry, the Receipt is of ample Uſe; and all Men may,

if they pleaſe, cover themſelves againſt the penal Conſequences of their Crimes by inſtituting a friendly Suit. Some ſuch we have known to have been ſo conducted as to eſcape the Attention of the Judges, who have not found out, till after the Cauſe has been decided, that the Cauſe has been colluſive. Caſes of this Sort are ſo open to Fraud and Colluſion, that for this Reaſon, if there were no other, the Courts of Criminal Juriſdiction will always reject ſuch Evidence. I do not know that Caſe has yet exiſted, where any Perſon has done ſo ſtrange a Thing, as to put it in the Power of the Court to receive or reject by offering ſuch Evidence. Your Lordſhips have had cited to you a Caſe, which, having been treated as it deſerves, need not be repeated by me; the Caſe of *the King* and *Vincent*: If it were poſſible to ſuppoſe that Caſe could be Law, that Suppoſition is removed, when your Lordſhips are told that a different Opinion upon the ſame Point has been held by the Judges that have ſucceeded in the ſame Court, and to whoſe Knowledge or Ability nobody, that knows who they are, would, I believe, object. The laſt of theſe Caſes, *the King* and *Stirling*, I am aware, may be attempted to be diſtinguiſhed, and for what I know the Firſt of them may, by ſaying that the Queſtion did not occur, the Objection was not taken in either of theſe Caſes; but your Lordſhips knowing before whom thoſe Criminals were tried, will believe that no ſuch Objection would have eſcaped theſe Judges, if it had been founded in Law, although no Counſel objected to it, or although the Criminals perhaps had not the Aſſiſtance of Counſel; therefore I conſider that Caſe as fairly diſmiſſed, and the ſubſequent Caſes as carrying an Authority upon our Side that more than overturns it: But I do not conceive, that even this was wanting; for the Inſtrument in the Caſe of *the King* and *Vincent* has no Reſemblance to the Sentence now offered; it was an official Inſtrument, neceſſary to give Sanction to a legal Right. Letters of Adminiſtration, or a Probate, may be admiſſible; but it does not by any Means follow, that a Sentence like this is admiſſible here; if it be, it muſt be equally admiſſible on all Sides. The Gentlemen argue, that your Lordſhips ſhould receive it, ſhould act upon it, ſhould conclude upon it; why? becauſe it is a Sentence reſcinding the Marriage, declaring that there was no Marriage; that is the Import of this Sentence, and therefore it operates in their Favour, and therefore it happens that they produce it. Let me invert the Caſe; let me ſuppoſe, that when this Lady inſtituted that Suit, the Party, who was the Object of it, had ſupported that Defence, as we conceive he was very well able to have done, and that in conſequence the Cauſe had ended in a Declaration or a Sentence, that there was a Marriage: In that Caſe would it have been Evidence upon the Part of the Proſecutor? Would it have been attended with thoſe Conſequences, which they are claiming for it now upon the Part of the Perſon proſecuted? Would your Lordſhips have endured, that the Proſecutor ſhould have come here to ſupport this Indictment by no other Evidence, than the Production of a Sentence in a Suit like this in the Spiritual Court, by which that Court had determined Mr. *Hervey* and the Lady he had married were Huſband and Wife? Can I poſſibly ſtate it to any Mind that comprehends it, that does not at the ſame Time revolt at the apparent Hardſhip and Injuſtice of ſuch an Idea? And yet is there any Thing more true, than that a Record cannot be Evidence of One Side, which would not, if it had imported the Reverſe, have been Evidence, and with equal Force of the other? I conceive it to be One of the fundamental Rules to determine what Evidence of this Nature is or is not admiſſible, that if it could not have been admitted on Behalf of the Party objecting to it, ſuppoſing its Import had been favourable to him, ſo neither ſhall it be admitted on the Part of the Perſon propoſing it. I truſt I may be warranted in preſuming that your Lordſhips think as I do; that in order to ſupport this Indictment ſomething more than ſuch a Sentence would be required from us; and that the Legiſlature in making this new Proviſion meant, that the Fact ſhould be enquired into, as all other Facts are enquired into; that the Relation ſhould be proved by thoſe who were Witneſſes to it, by thoſe who can prove the Confeſſion of the Parties to it, or by thoſe who can give ſuch other Evidence as Courts of Criminal Juriſdiction are authorized to act upon. Can any Thing then be more obviouſly unſuitable to any Ideas of Juſtice, than that the Enquiry ſhould be precluded by a Record in Favour of One of the Parties, which might have been as favourable to the other Party, and which if it had been, would not have been regarded?

If your Lordſhips think fit to admit this Evidence, and by ſo doing to raiſe a Queſtion upon the Effects of it, the Gentlemen argue with ſome Appearance of Triumph, that this Kind of Sentence is concluſive, for that there are various Inſtances, in which Sentences of theſe Courts, in which Judgments of other Courts, have been held concluſive; for this Purpoſe your Lordſhips are furniſhed with a great String of Caſes, ſome of Condemnations in the Court of Exchequer, ſome even from Boards of Exciſe, ſome from Courts of Admi-

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ralty, ſome from domeſtic and ſome from foreign Courts. There has exiſted, and fitly exiſted, ſuch a Comity in the Practice of One Court towards the Proceedings of another, that, whether the Court be foreign or domeſtick, the Courts preſume, that what is done is rightly done, that there has been no Colluſion, that there has been no Fraud, that the Judgment and Decree is what it ought to be, the Effect of an adverſe Suit between adverſe Parties. Preſuming the Effect of ſuch Sentences, ſuch Decrees and Judgments, in Civil Cauſes to have been what it has been ſtated to be, it muſt have been upon the Suppoſition and upon the Preſumption that the Sentence or the Decree has been fairly and rightly obtained: But if this Degree of Concluſiveneſs were allowed to it in Criminal Caſes, if ſuch a Sentence were allowed to be concluſive, where the Parties are unprepared in Point of Evidence to impeach it, and if ſuch were allowed to be the Effect of it in ſuch a Caſe in Courts of Criminal Juriſdiction, it would obſtruct the Courſe of Juſtice in a thouſand Inſtances, and in Effect operate to the Repeal of this and many other wholeſome Laws. In this Inſtance the Miſchief would too be great if the Policy of this Law be queſtionable, if that which we call a Crime is an innocent Action. If there is no Impropriety in the Practice now brought under your Lordſhips Conſideration, if Polygamy deſerves Encouragement inſtead of a Check, then in another Character your Lordſhips will do well to repeal the Act; but do not do it in your judicial Character.

My Lords, Caſes may be ſuppoſed, and we are in a Situation that authorizes us, nay, not only authorizes but requires us to ſuppoſe, the groſſeſt Caſes that our Imaginations can furniſh. It is not difficult to ſuppoſe a Caſe, in which the directeſt Fraud upon the Court may be practiſed by Means of the groſſeſt Perjury, and yet through the Colluſion of the Parties it may be managed with ſo much Dexterity, that it would be impoſſible to get at them; and in all theſe Inſtances the Effect I am now deprecating would be of courſe let in upon the Criminal Juriſdiction of this Country.

My Lords, I am perſuaded your Lordſhips will not do this. In what I have ſaid upon this Point, I have anticipated in Part the Queſtion which I ſtated as the Third in the Order, in which I purpoſed to conſider the Argument on the Part of the Lady at the Bar. All her Counſel have attempted to contend for the Concluſiveneſs of this Sentence; and they all mean, I preſume, to inſiſt upon it as precluding an Enquiry into the Mode of obtaining it. The other learned Gentlemen will excuſe me, if I ſeem to have been leſs attentive to what fell from them, than to the Second Counſel on the Part of the Lady. The Fact is, I heard him more diſtinctly than thoſe who preceded or followed him. He choſe to conſider this Act as not having created a new Offence, but as having ſimply varied the Puniſhment and Mode of Trial of a known Offence, which exiſted as the Law ſtood then. I am at a Loſs to comprehend, in what Senſe this can be conſidered as having not created a new Offence. This Act declares ſomething to be a Felony, which before was no Felony; this Act creates that to be a Felony, enquirable into in the Way in which other Felonies are by Law enquirable into, in a Caſe, that was before only cognizable as an Offence againſt the Canon Law, and enquirable into in a Suit, which had nothing for its Object but the ſpiritual Intereſt of the Party. I conceive it to be a new Offence in the ſame Senſe, in which almoſt all the ſtatutable Offences in this Country are new Offences: This Act has not only created a new Offence, but, as I conceive, aboliſhed an old one; for I doubt whether it be now competent for an Eccleſiaſtical Court to proceed to enquire into Offences of this Sort, if it were (as has been ſuppoſed) their Practice before this Act. By the Cuſtom of *London* a certain Species of Defamation is actionable there; and upon that Ground the Temporal Courts proceed in granting Prohibitions to ſtay Proceedings of the Spiritual Court in ſuch Caſes; ſo I apprehend the Courts would do here, if the Spiritual Court proceeded *pro ſalute animæ* in a Caſe of Polygamy. My learned Friend aſſumed, that this Sentence would ſtop the Proceeding of ſuch a Cauſe in the Eccleſiaſtical Court, but referred to the learned Doctors to make it out; which the learned Doctors, I preſume not liking the Reference, forgot to attempt; ſo it ſtands as a Point aſſumed, but not proved, that the Spiritual Court would at this Time entertain ſuch a Suit, and that its Progreſs would be ſtopped by ſuch a Sentence. Your Lordſhips heard a very pathetic Deſcription of the melancholy Situation in which the Lady will ſtand under this Sentence, if this Proſecution proceeds, and in conſequence of it ſhe ſhould be treated in the diſagreeable Way to which the Act expoſes her. She will nevertheleſs, it has been ſaid, after having been puniſhed as a married Woman, be totally deſtitute of any Advantage in preſent or future of that Marriage; ſhe can never claim any Conjugal Rights, nor (if her Circumſtances did not preclude the Neceſſity of her ſeeking it) could ſhe compel any Maintenance from this Gentleman

tleman during hisLife-time, nor can ſhe, if ſhe ſurvives this ſuppoſed Huſband, ſupport any Claim to his Fortune.

My Lords, The Huſband is in the ſame lamentable Situation: It is equally incompetent to him, while this Sentence ſtands, to derive any Advantage in point of Comfort during her Life-time, or in Point of Succeſſion upon the Death of the Lady. It may be ſo; but if it is ſo, it will not be the Effect of the Judgment your Lordſhips will be to pronounce: It is the Effect of thoſe Practices between the Parties which have produced this Sentence, and which have made this their Situation and their State.

My Lords, It will be time enough to conſider this Queſtion, when the Caſe ariſes. If ever this Lady ſhould re-aſſume an Inclination to eſtabliſh that Relation, which in this Suit ſhe has thought good to diſclaim; or if it ſhould ever be the Pleaſure of the Earl of *Briſtol* to connect himſelf again with this Lady under the Relation of an Huſband; it will then be time enough to enquire, what they can or cannot make of ſuch a Claim, or what the Impediments are, which they will have to remove in order to eſtabliſh that Claim. As neither of theſe Caſes are very likely to ariſe, it is immaterial to go further into the Enquiry of what may propably or poſſibly be the Conſequence of them. It occurred to the learned Gentleman to conſider, that it was very poſſible he might be led by this Train of Reaſoning into the Conſideration of the Effect of the Colluſion. Your Lordſhips will permit me to remark, that the learned Gentleman, who ſpoke Firſt upon that Side of the Queſtion, choſe to be perfectly ſilent upon this Head: He did not ſeem to know, that it would be likely to occur to us in the Conſideration of this Sentence to ſuggeſt, that it was colluſive; for unleſs it were by an Alluſion to the Caſe of *Hatfield* and *Hatfield*, the Notion of Colluſion, as making a Part of this Queſtion, did not ſeem to have occurred to him. Mr. *Mansfield* ſaw the Certainty of the Colluſion being introduced into the Argument: To obviate it he uſed Three Caſes, Two that had been mentioned before, and a Third he introduced for the Purpoſe; the Firſt, in the Order of Time, was the Caſe of *Kenn* in my Lord *Coke*, which whoever reads, will ſee that the only Point determined, and the only Point to be determined in that Caſe, was, that it was not competent for the Party to traverſe an Offence that had been found againſt him: All the Reſt is that Sort of Lucubration which adorns, and in many Inſtances improves the Reports of that learned Judge of the Deciſions of his own Time. And this is the Uſe that is attempted to be made of this Part of the Argument; that it was founded in Falſhood, and therefore was upon the Face of it colluſive: The Falſhood was, that the Party was in a Condition, as it turned out by ſubſequent Enquiry, to have made a better Caſe than he did make; and from thence it is to be taken for granted, that of Purpoſe and Deſign he abſtained from making that Caſe that he did not make. Your Lordſhips know better the Nature of Buſineſs, than from ſuch a Circumſtance to infer a Fraud: The beſt bottomed Cauſes often miſcarry for want of that Evidence, without which they cannot be ſupported. The next Caſe, that of *Morris* and *Webber*, from *Moore*'s Reports, ſeems to me to be ſtill leſs material or uſeful to the Purpoſe for which it is produced; that was the Caſe of a Divorce *propter impotentiam viri*; the Parties marrying afterwards, Fruit of each of theſe Marriages was the Birth of Children; perhaps it may occur, that that Circumſtance did not afford a very deciſive and concluſive Proof of the Negative of the Ground upon which that Decree was pronounced; it is not an impoſſible Caſe, that what had happened might happen, although the Divorce was perfectly well founded in point of Fact: But ſuppoſe it were taken for granted, that the Child muſt of Neceſſity be the Iſſue of a Man, who had been divorced *propter impotentiam*; yet that it muſt of Neceſſity be inferred from thence, that this Sentence was colluſively obtained, remains to be made out. I conceive that this Caſe, any more than the One that proceeded it, does not afford a Colour to ſay, that the Queſtion of Colluſion and the Competency of going into the Queſtion of Colluſion occurred to the Court in either of theſe Two Caſes. In the Caſe of *Hatfield* and *Hatfield*, a Man, who under Colour of being the Huſband of the Woman, had taken upon him to releaſe ſome Intereſt which ſhe was intitled to, and he claimed to be intitled to in her Right, and the Queſtion turned upon the Effect of that Notion; there was afterwards a Sentence between the Parties againſt the Marriage; whether the Means to obtain it were fair or foul, fraudulent or otherwiſe, were are left to gueſs at. Your Lordſhips will not, I preſume, adopt all the printed Reaſons, good, bad, or indifferent, that are offered to your Lordſhips at the Cloſe of your printed Caſes. Your Lordſhips Predeceſſors in that Caſe could do no otherwiſe than they did; they ſaw, that the Deciſion in the Court below was right, and upon that Ground they affirmed the Decree. Now what was the Thing decreed, and the Point in Controverſy between the Parties? The Man, while he paſſed for this Lady's Huſband, took upon him to releaſe an Intereſt, which it was not competent

for him to releaſe, whether he had or not that Character, the Subject of the Releaſe being a Legacy, left to her under a Will, in ſuch Terms as operated to give her in Equity a ſeparate Intereſt. I need not contend that in a ſeparate Intereſt of the Wife the Huſband cannot controul or deprive the Wife of it by any Releaſe of his. A Court of Equity had decided againſt the Party claiming under the Releaſe, which, according to the ſettled Doctrine of Courts of Equity, it was equally bound to do, whether the Party releaſing had or had not married the Woman whoſe Intereſts were to be affected by it; and the Queſtion (Huſband or no Huſband) was juſt as foreign to the Merits of that Deciſion, as any Thing that could be talked about in the Cauſe. Totally therefore laying out of the Queſtion all that had been ſaid upon the Subject that was not neceſſary to the Deciſion of the Caſe, the Houſe of Lords affirmed the Decree of the Court, becauſe they ſaw it had rightly decided the only Point in Controverſy between the Parties. Theſe then are the Caſes, upon the Ground of which, and upon the Ground of which alone, for I have not been able to collect a Fourth, your Lordſhips are deſired to decline doing that in this Inſtance, which we contend your Lordſhips are bound in Juſtice to do; that is, to let us into the Enquiry by what Means this Sentence was obtained. The Gentleman, particularly, who made this Uſe of theſe Three Caſes, could not forget the familiar Practice, which he is a Witneſs to every Day of the Year, of impeaching the Judgments of the Courts of Law, whenever they are impeachable upon the Foundation of Fraud and Covin. It never occurred to a Court in which ſuch a Queſtion ariſes to refer the Party, who makes a Complaint of a Judgment ſo obtained, to the Court in which it was obtained; or to direct him to inſtitute a Suit to get rid of it; he impeaches it juſt when it affects him, and not further than as it affects him; beyond that it is a Matter of perfect Indifference to him, whether it ſtands or falls; for the Purpoſe of doing that, which alone he is intereſted in doing, the Party, who would otherwiſe be prejudiced by ſuch a Judgment, is conſtantly and daily permitted to ſay, that this was a Judgment obtained by Covin: This Allegation is uſually formed into an Iſſue, and if that Iſſue is determined in his Favour, though the Judgment ſtands as to every other Perſon, *quoad* him it is avoided in the Manner we are ready to avoid this Sentence. It was ſaid, that the Reaſon why Creditors are permitted ſo to avoid Judgments ſet up to their Prejudice by Executors or Adminiſtrators, who ſeek to cover Effects in their Poſſeſſion by falſe Judgments, is, becauſe theſe People cannot be relieved in any other Form; it cannot be referred to any other Court. I am perfectly content to take that as the Principle; then it remains, in order to ſupport this Diſtinction, for the learned Gentlemen among them to make out, that it is competent to his Majeſty to make himſelf a Party to this Suit in the Spiritual Court, or to inſtitute there, by his proper Officer, a new Suit to get rid of this Sentence. The Gentlemen have not attempted it; it would be ridiculous; and I fancy I may preſume it will not be attempted: It is not competent, much leſs neceſſary, for the King or his Law Officers to go into that Court for a Purpoſe ſo idle as this. Taking this then to be the Reaſon, why it is admitted in Civil Cauſes to Creditors to get rid of Judgments, by which they are attempted to be injured, by ſhewing that they were colluſive and fraudulent, does it not follow by Parity of Reaſon, that it is equally proper that the ſame Thing ſhould be done here, ſuppoſing that your Lordſhips ſhould for a Moment forget this to be in a Criminal Cauſe, in which the Reaſons for ſo doing are ſo much the ſtronger? Another Diſtinction between this Caſe and that was attempted: It was ſaid, this is not the Caſe of a Third Perſon complaining of an Injury ariſing by a Sentence, and wiſhing to avoid it ſo far only as it affects him; but it is a Suit inſtituted for overturning the Sentence. I apprehend it is not ſo; we contend for nothing but to lay this Sentence out of our Way, as applied to the preſent Subject; juſt as you lay out of the Way a Judgment between *A.* and *B.* where it is attempted to be uſed to the Prejudice of *C.* After your Lordſhips have convicted this Lady, if in the Reſult of the Enquiry it ſhould be proved, that ſuch is the Juſtice of the Caſe, I do not know that the Verdict or the Judgment in this Caſe will be Evidence upon an Enquiry into the ſame Facts for another Purpoſe. If the Reſult of the preſent Enquiry is underſtood to eſtabliſh the Marriage, and to nullify the Sentence, it is, becauſe the Sentence is in its Nature, when it comes to be enquired into, really and truly null and void; not becauſe that ſuch is the Effect of any operative Power and Force, that belongs to your Lordſhips Conviction. This is not a Proſecution for the annulling of that Sentence; this is a Proſecution to ſubject the Party to the Puniſhment, which is by Law due to the Offence charged upon her. It cannot be attended with any other poſſible Conſequence: Upon the ſame Ground that the Sentence is attempted to be impeached here, it may be impeached every where, except by the Parties, who may perhaps have precluded themſelves by their Conduct from Impeaching it.

My

My Lords, As there are no Authorities on the One Side, it remains for a Moment only to obſerve, that there are Authorities on the other Side: As applied to Civil Caſes Two have been mentioned; the good Senſe of both the Authorities, particularly of One, I ſhould apprehend eſtabliſhes this Propoſition clear of all Controverſy; for, when in the Caſe of the Action againſt *Conſtantia Phillips* of famous Memory, it was determined, that whatever Objections would avoid a Judgment in a Court of Common Law, would be ſufficient to overturn a Sentence in the Spiritual Court, but none other; one ſhould have imagined that the Propoſition carried with it ſo much good Senſe, that all the World ſhould feel it and adopt it. The *Scotch* Caſe is by the higheſt Authority, and there the true Uſe that is to be made of a Judgment in another Court is aſcertained and limited; it is Evidence; it is ſtrong Evidence; but it remains to be explained; and ſtill more, it remains to be laid out of the Caſe in a Cauſe like this, and in a Caſe like that of *Phillips*, where there exiſted a Ground to impute Colluſion and Fraud to it. In *Phillips*'s Caſe it was not permitted to her to avail herſelf of that Colluſion and that Fraud. Why? becauſe it was a Fraud of her own: But the learned Judge, when he refuſed to permit her to impeach that Sentence, which ſhe had obtained by Colluſion and Fraud, adds, according to Mr. *Ford*'s Manuſcript Note, that as againſt all others, whatever Objections would avoid a Judgment in a Court of Law, would be ſufficient to overturn a Sentence in the Eccleſiaſtical Court. We deſire to overturn this Sentence upon no other Grounds, than Sentences and Judgments in Courts of Law are every Day overturned by: They muſt continue to be ſo overturned in future, as long as there continues to be any Attention to Truth and Juſtice in the Deciſions of Courts of Judicature. I do apprehend, that your Lordſhips will not think, that I take an improper Freedom with the Sentence or the Court, whoſe Sentence it is, by deſiring that your Lordſhips will by-and-by form an Opinion of the Purity of their Proceedings by the Specimen, that we ſhall give you of them, when we come to ſtate and prove the Means by which this Sentence was procured; and then perhaps your Lordſhips will ſee no Reaſon for raiſing it above the Level of other Courts, on which we are content to leave it. With your Lordſhips Permiſſion I would ſupply an Omiſſion, I meant to have ſtated in its proper Place; the Caſe of *Robins* and *Crutchley*. A Mrs. *Robins* commenced an Action of Dower, claiming a Share of the Succeſſion to her ſuppoſed Huſband Mr. *Robins*: This Lady had been claimed to be the Wife of a Sir *William Wolſeley*: Sir *William* ———, upon the Suppoſition that ſhe was his Wife, had inſtituted a Suit in the Spiritual Court, probably with an Intention to get rid of her, charging her with having committed Adultery with *Robins*: In the Courſe of that Enquiry in the Spiritual Court it came out to the Satisfaction of the Court, that ſhe was the Wife of *Robins*, and not of Sir *William* ———. This Sentence was introduced in pleading in this Cauſe of Dower for the Purpoſe of repelling a Denial on the Part of the Heirs of Mr. *Robins*, that ſhe bore any Relation to them or to their Anceſtor. To that Replication there was a Demurrer, which brought under Conſideration of the Court of Common Pleas the Effect of this Sentence ſo pleaded. The Opinion of the Court of Common Pleas was to allow that Demurrer; and though the Point decided may perhaps be only this, that that Sentence could not avail the Party in that Form of Pleading; yet I conceive that Point muſt be very erroneouſly decided, if the Sentence were of the Deſcription, which has been attempted to be paſſed upon your Lordſhips; for if had been underſtood to be concluſive and preclusive of all further Enquiry, moſt undoubtedly it would have been a proper Subject to be introduced in pleading as a Bar to any farther Enquiry. Your Lordſhips, by looking into the only Report in Print of that Caſe (Mr. Serjeant *Wilſon*'s) will find, that the learned Judges of the Common Pleas, who decided it, ſeemed to be agreed in thinking, that it was very far from an eſtabliſhed Point, that this Sentence was concluſive, that the Queſtion could only be tried upon the Iſſue *ne unques accouple*, which your Lordſhips know to be the only proper Iſſue in a Queſtion of Dower, and that Iſſue muſt be determined by the Biſhop's Certificate. Now we are told that this Sentence is juſt equivalent to the Certificate of a Biſhop: This was ſo far from being the Opinion of that Court, that they leave to the Biſhop to judge for himſelf, what Regard he would pay to that Sentence on the Point which he was to certify.

Doctor Harris.

My Lords,

It would ill become me at this Time, after the Points, which have been propoſed, have been ſo fully diſcuſſed by the Gentlemen who have gone before me, to take up much of your Lordſhips Time.

There are Two Queſtions, as I underſtand, before your Lordſhips.

The Firſt of them is, Whether a Sentence in a Cauſe of Jactitation can be given in Evidence, as an abſolute Bar to a Proſecution by the King? and the other is, Whether, on Suppoſition that a Sentence in a Cauſe of Jactitation can be given in Evidence, it will afford a complete Defence, ſo that no Proofs whatever can be admitted afterwards in order to counteract and impeach that Sentence?

How theſe Queſtions come before your Lordſhips, whether properly or improperly, is not for me to argue. It is out of my Profeſſion to ſay any Thing about them; but as the Gentlemen on the other Side have been permitted to ſtate them and argue on them, it is certainly neceſſary that they ſhould alſo be diſcuſſed by the Counſel for the Proſecution.

In regard to the Firſt Queſtion, I ſhall not trouble your Lordſhips long, becauſe the Diſcuſſion of it relates principally to the Practice of Courts of Law; but ſhall more particularly attach myſelf to the Conſideration of the Second; as I ſhall in ſo doing have an Opportunity to ſay a Word or Two in Anſwer to what the Gentlemen have urged on the other Side, who are of the ſame Profeſſion, and practiſe in the ſame Courts where I have the Honour to attend.

In reſpect to the Firſt Queſtion, Whether a Sentence of Jactitation is an abſolute Bar, and can be offered as ſuch, to a Suit at the Proſecution of the King, it is to be obſerved, that anciently the whole Cognizance of Marriage, with that of the Crimes attending it, was veſted in the Eccleſiaſtical Courts: But thoſe Courts being either remiſs in the Exertion of their Juriſdictions, or, more probably, wanting Power to inflict an adequate Puniſhment ſufficient to ſtop the Growth of the increaſing Evil, and the Legiſlature, for conſtitutional Reaſons, being both unwilling and unable to inveſt them with more Authority than they then had, the Aid of Parliament became abſolutely neceſſary; and the Statute of *James* the Firſt, on which the Priſoner ſtands indicted, was accordingly made; by which it was enacted, that if any Perſon being married, ſhall marry another, the former Huſband or Wife being alive, *the Offence ſhall be Felony.*

Before this Statute the Eccleſiaſtical Courts had the Cognizance of the Crime of taking a Second Wife, or a Second Huſband, whilſt the Firſt Wife or Firſt Huſband was living: But the Statute, as I underſtand, takes that Branch of the Juriſdiction, namely, the Power of inflicting any Puniſhment whatever on a Perſon guilty of Polygamy, intirely from the Eccleſiaſtical Courts; inſomuch, that, if at this Time a Proceſs was to iſſue from an Eccleſiaſtical Court in order to call any Perſon to account for Bigamy or Polygamy (whichever it may be termed) the Party cited might obtain a Prohibition from the Judges of the Temporal Courts to ſtop ſuch a Suit, in the ſame Manner as a Prohibition may be obtained in caſe of a Proſecution in an Eccleſiaſtical Court for Perjury not committed in that Court, or for any other Crime puniſhable by a Statute. Now, my Lords, it is evident, that the One Court has loſt what the other has gained, in reſpect to the Offence of Bigamy; ſo that the Temporal Court, or rather your Lordſhips, are able to judge of Bigamy, and of every Eccleſiaſtical Matter incident to that Branch of Spiritual Juriſdiction. It may here be obſerved, that a Jactitation Cauſe is deſcribed in our Books of Practice to be a *quaſi* defamatory Suit; and moſt certainly it is ſo and nothing more, when a Perſon libelled againſt in Jactitation confeſſes the Boaſting; as when a Man cites a Woman for Boaſting, and ſhe acknowledges the Jactitation; for the Cauſe ends here, and is ſtrictly of a defamatory Nature. But I do not mean to deny, when the Defendant undertakes to juſtify, that the Cauſe then becomes truly matrimonial; for the Sentence will then neceſſarily be either, that the Parties are Man and Wife, or that the Plaintiffs or Party Agent is free from all matrimonial Contracts, *quantum nobis conſtare potuit*, or as far as to us as yet appears. But though a Sentence in theſe Words may have frequently been adjudged [as in *Jones* and *Bow*, *Carthew* 225—and in *Clews* and *Bathurſt*, *Strange* 960.] to be binding on the Temporal Courts in Caſes of Property, till reverſed; yet it by no means follows, that ſuch a Sentence can amount to an Acquittal of the Plaintiff from having any farther Evidence brought againſt him, the very Words, *as far as to us yet appears*, implying the contrary and evincing, that farther Proofs may legally be adduced in the proper Court. The Words of the Sentence ſpeak ſufficiently for themſelves: There is no Occaſion to have Recourſe to Authorities from Books. Let it be ſuppoſed for a Moment, that the antient Juriſdiction remained in the Eccleſiaſtical Courts, and that they poſſeſſed their former Power; is it poſſible to conceive, that a Sentence like the preſent, pronouncing a Woman to be a Spinſter, as far as to the Court as yet appears, could be a Bar to a Suit in the ſame or in another Eccleſiaſtical Court againſt the ſame Woman for Polygamy? If it could be a Bar, it would amount to an Acquittal, till the Sentence in the civil Suit had been reverſed; which would be ſubverſive of Juſtice by making the Commiſſion of an undiſcovered Crime in One Court a Shelter againſt the Puniſhment of that very Crime in another. If the Doctrine now contended-for ſhould prevail, that the Offering of a Sentence in Jactitation, pronouncing the Party Agent free from

Matrimony

Matrimony as far as it as yet appears, is an abſolute Bar to a criminal Proſecution, there would be an Opportunity on every Indictment for Polygamy to defeat the Statute; for in the Caſe of a Woman marrying Two Huſbands, if the Firſt Huſband ſhould conſent to a colluſive Suit, the Wife would have nothing to do but to cite the Firſt Huſband into an Eccleſiaſtical Court for Jactitation, if ſhe apprehended a Proſecution on the Statute; and then either on Confeſſion of the Boaſting by the Firſt Huſband, or on his failing to prove his Marriage, if he undertook the Proof, a Sentence would be obtained, which would intirely defeat the Statute. That this Houſe ſhould give a Countenance to a Doctrine of ſuch Tendency, is not to be imagined. It would be ſo far to reſtore the Eccleſiaſtical Courts to their former Authority, as to put it in the Power of evil diſpoſed Perſons to uſe thoſe Courts to the Defeazance of the Statute, without giving back to the Eccleſiaſtical Courts a Juriſdiction to puniſh the Crime of Polygamy, which would thus go unpuniſhed: It would be to render thoſe Courts in this Reſpect hurtful, without affording them an Opportunity of being uſeful; and it would in Effect be to deſtroy a Law in your Lorſhips judicial Capacity, which had formerly on the matureſt Conſideration been eſtabliſhed in this Houſe as a Part of the Legiſlature.

It would now be improper for me to detain your Lordſhips any longer on this Queſtion, which has been ſo ably and fully diſcuſſed already; and I ſhall truſt, that your Lordſhips cannot be prevailed on to declare the Sentence in Jactitation concluſive upon this high Court, or to ſuffer it to be read judicially as a Stop to any Evidence which may be brought as a Proof of the Marriage of the Lady at the Bar with Mr. *Hervey*, now Earl of *Briſtol*.

But on Suppoſition that the Sentence may be permitted to be judicially read, it may be neceſſary for me, in Contradiction to what the Gentlemen of my own Profeſſion have aſſerted, to trouble your Lordſhips with a Word or Two in the briefeſt Manner I am able, in order to ſhew, that Evidence of a particular Kind may be given in all Courts, and at all Times, to rebut a Sentence in Jactitation in Diſfavour of Matrimony, for the Purpoſe of relieving an injured Party and of puniſhing the Guilty.

It is a general Rule, which is not to be denied, that Reſpect is due from One Court in *England* to the Deciſions of another; and that Comity is due to the Deciſions of all foreign Courts; and it might be more accurate and more ſtrictly true to ſay in general, that One Court in *England* is bound by the Judgments and Sentences of another; but the Generality of this Rule does not exclude an Exception, which in Reality affords a Proof of its Generality; for, under Circumſtances, Evidence of every Sort, parol as well as inſtrumental, may be received in One Court to affect a Sentence in another. Fraud in a ſingle Perſon, and Colluſion, where there are Two or more, may be given in Evidence in the ſame Court in a different Suit, or in another Court, to affect the Parties to a Sentence; and of courſe to affect the Sentence or Judgment itſelf in ſome Degree.

It is true, that by the Eccleſiaſtical Law a Sentence in any Caſe obtained by Colluſion may be declared void in the ſame Court in which it was pronounced, by means of a ſpecial Suit for that Purpoſe; and moſt certainly at the Suit of a Perſon having an Intereſt, who could not even have intervened at the Time when the Suit was pending; and ſuch was the Caſe of Lady *Frances Meadows*, who had no Intereſt in the Years 1768 and 1769, when the Suit of Jactitation was pending: But it does not follow, becauſe a Sentence obtained by Colluſion may be annulled in the ſame Court where it was pronounced, that ſuch Sentence may not be impeached by any Means whatever in another Court.

I ſhall not, in Proof of what I have advanced, detain your Lordſhips with a Repetition of the Particulars of *Fermor*'s Caſe as reported in the Third Part of *Coke*'s Reports. I ſhall only obſerve that it was a Caſe depending in the Court of Chancery in the 44th of *Elizabeth* before Sir *Thomas Egerton*, the then Lord Keeper, in which *Richard Fermor* complained, that *Thomas Smith* the Defendant was his Tenant, and had levied a Fine with Proclamations, in order to bar him of his Inheritance, by *Covin* and *Practice*. The Lord Keeper conſidering on one Side the Miſchiefs which might ariſe from ſuch Practice, and on the other Side conſidering that Fines and Proclamations are the general Aſſurances of the Realm, referred the Caſe to the Two Chief Juſtices, *Popham* and *Anderſon*, who, after a Conference, thought it neceſſary, that all the Juſtices of *England* and Barons of the Exchequer ſhould be aſſembled—they aſſembled accordingly, and it was at length reſolved by the Two Chief Juſtices and Barons of the Exchequer, except Two, that *Richard Fermor* was not barred by the Fine with Proclamations. The Lord Keeper Sir *Thomas Egerton* commended the Reſolution of the Judges, and agreed with them in Opinion.

The Precedents and Reaſons, on which the above-mentioned Opinion was formed, have already been ably related, and are well known to ſome of your Lordſhips: It may ſuffice on my Part to add, that a Fine, the moſt deliberate (for it is Five Years in completing) and

and of courſe the moſt ſolemn of all Judgments, was not deemed, in the Opinion of the Lord Keeper and Ten of the Judges, to be of Weight ſufficient to protect a colluding Party; but was ſuffered to be impeached by the Admiſſion of Evidence in another Court than that where the Fine was levied, in order to afford Relief to an injured Man.

It is ſaid by Lord *Coke* in the ſame Report, that all Acts Eccleſiaſtical as well as Temporal ſhall be avoided by Fraud and Covin. And indeed if One Temporal Court is bound in Juſtice and Law to pay no Regard to the Judgment of another Temporal Court under the Circumſtances above deſcribed, can any Reaſon be given, why the Sentence of an Eccleſiaſtical Court in ſuch a Caſe ſhould be treated with more Reſpect by the Temporal Judges, than they are obliged to pay to the Judgments of their own Courts?

But to the Honour of the Temporal Courts it muſt be ſaid, that, as far as it is in their Power, they lend their Aid to the Eccleſiaſtical Courts in caſe of Covin and Colluſion, by permitting the Eccleſiaſtical Courts to try ſuch Fraud, even when committed in the Temporal Courts, as incidental Matter.

The Caſe alluded to is in *Moor*'s Reports, Page 917, *Lloyd* and *Maddox*.

Mr. *Lloyd* a Legatee ſued *Maddox* the Executor of the Deceaſed in the Spiritual Court for his Legacy. The Executor alleged, that all the Teſtator's Effects had been recovered from him the Executor, in a Court of Common Law, by a Creditor of the Teſtator. The Legatee alleged in his Turn, and undertook to prove in the Eccleſiaſtical Court, that the Recovery at Common Law was in conſequence of Colluſion or Covin between a pretended Creditor and the Executor. And, upon the Admiſſion of this Plea in the Eccleſiaſtical Court, the Executor applied to the Temporal Court for a Prohibition, which was denied.

And from this it is evident by neceſſary Inference, that the Temporal Courts muſt have deemed themſelves competent to judge incidentally of Covin or Colluſion committed in a Spiritual Court, in order to relieve an injured Party or Suitor in a Temporal Court.

When this Liberty taken by One Court with the apparent Judgment of another, under Circumſtances, comes to be conſidered, it ſeems to be founded on the ſtrongeſt Reaſon: For when a Judgment has been procured by a Colluſion of Parties, though it muſt ſtand on Record, and may not, I grant, be *actually* expunged or taken from the File, but by the Court in which it was given; yet it is certainly a mere Nothing to thoſe, who, not being *privies*, can ſhew it falſe and covinous. It is a Sentence in which the Judge had never an Opportunity of doing real Juſtice—and is undoubtedly, what it has been juſtly ſtiled by a Writer on the Civil Law, a Stage Play, a prophane Mockery, or any Thing but a Judgment. It is not to the Diſrepute, but to the *Honour* of a Court, as well as to the Benefit of the Publick, that ſuch a Fraud ſhould be detected. The upright Judge muſt of all Things wiſh it.—And confident I am, that to diſcover ſuch a profligate Proceeding (from which no human Wiſdom can protect the greateſt judicial Abilities) could never be conſtrued into a Breach of Comity between one Judicature and another; but, on the contrary, muſt be conſtrued by the deceived Court as a Vindication of its Purity and a Reſcue from an Attempt to load it with Diſcredit.

I muſt now own, my Lords, when I was informed that Doctors of the Civil Law were, by the Permiſſion of your Lordſhips, to attend on the Part of the Lady at the Bar, and a Brief was given to me on the Part of the Proſecutor on that Account, that I was apprehenſive of what might be quoted from ſuch miſcellaneous Books, as the Digeſts, the Code, and the Decretals in favour of Colluſion, and to ſhew how honeſtly it might be practiſed under particular Circumſtances. Nothing however of this Kind has been urged; and I have not myſelf, from any Inſpection of the Titles and Text of the Civil and Canon Law, *De Colluſione detegenda*, which treat principally of colluſive Cauſes between Maſters and Slaves, and between certain of the Clergy in order to defraud the Laity, been able to gather any other Idea than that Colluſion between Parties to a Suit is a very high Offence; and ſuch a One, I make no Doubt, for which colluding Parties might now be articled againſt in the Eccleſiaſtical Court, where the Inſult was offered, and be puniſhed at Diſcretion by Eccleſiaſtical Cenſures. But a particular Diſcuſſion of the Nature of the Offence committed by Parties colluding in a Cauſe, how that Colluſion is to be treated when diſcovered, and what Operation the diſcovered Colluſion will have upon the Sentence, is rather to be expected from later Writers, and ſuch Authors as *Menochius* in his *Conſilia*, or *Scaccia de Re judicata*, than from the Laws in the Text of the Civil and Canon Law.

And theſe Authors agree in general in ſaying, *Quod lata Sententia per Colluſionem habenda eſt pro Non-Sententia, et quod aliis non nocet, quamvis, ſublata Colluſione, noceret. Nam facta Colluſione cum Adverſario* [ſays Scaccia] *Sententia non prodeſt adverſus tertium; vel quia tertius erat citandus, et tunc Victori non prodeſt Sententia, etiamſi eam obtinuiſſet ſincere.*

As when an Executor [for Example] deſirous of proving his Teſtator's Will, omits to cite One among others of the next of Kin; for in that Caſe the omitted Perſon may, if he thinks it for his Intereſt, oblige the Executors to prove the Will *de novo* at a ſubſequent Time, the Sentence eſtabliſhing the Will under the Proceſs, by which One of the next of Kin was omitted, being as to him in the true Senſe of the Expreſſion, *Res inter alios acta.*

The ſame Author proceeds by adding,

Vel non erat citandus, quia Cauſa agebatur cum legitimo Contradictore; et tunc licet, ſi Sententia fuiſſet lata ſine Colluſione, tertio noceret, tamen, ſi fuerit lata per Colluſionem, non nocebit.

This may be explained by the following ſuppoſed Caſe: If an Executor to prove his Teſtator's Will ſhould cite *all* the next of Kin regularly, but ſhould collude with that next of Kin, to whom the Management of the Suit was intruſted, and prevail on him to faint-plead, and not put forth his Strength on account of ſome private Bargain, and by this Covin eſtabliſh the Will; yet, though the Sentence in this Caſe would have bound the legal Contradictors, who had been all called, and alſo all other Perſons whatever, if there had been no Colluſion, it ſhall nevertheleſs not bind the injured Part of the legal Contradictors, on a Proof made of the concerted Fraud.

It muſt be allowed, that theſe Writers have not (as far as I have been able to obſerve) made mention of the Place or Court, where a Sentence colluſively obtained is to be ſet aſide; and if an actual Setting aſide or total Reverſal is meant, there is no Doubt, but that this muſt be done in the ſame Court where the Parties colluded, and in no other.

But if it is only aſked, where and in what Court Evidence is to be received to relieve an injured Perſon, who was not a Party to the Colluſion? my Anſwer is, that it is plain from theſe Writers, as well as from Reaſon, that it is to be received *in every Court.*

The Courts of Civil Law, known to theſe Writers, hear in the ſame Court and under the ſame Juriſdiction Cauſes of Property, and alſo Accuſations which affect the Life of the Accuſed, exactly in the ſame Manner as our Admiralty Courts in *England* did before the 28th of *Henry* VIII. and therefore when *Scaccia* and other Writers, who entertain the Idea of the ſame Court having both Civil and Criminal Juriſdiction, ſay that a Sentence obtained by Colluſion is to be regarded *pro non Sententia*, their Meaning fairly taken muſt be, that ſuch a Sentence would be effectually avoidable, or rather diſregarded *every where*, on a proper Proof made of the Fraud, by which it was obtained.

I am aware that the Caſe of *Mayo* and *Brown* was quoted by the Advocates on the other Side, as a late Inſtance, in which the preſent Judge of the Prerogative Court, Sir *George Hay*, whoſe Decrees will always have great Weight, was of Opinion, that he could not in his Court receive Evidence of a Sentence having been obtained by Colluſion in the Court of the Biſhop of *London.*

The Caſe, in brief, was as follows:

One Mrs. *Ailmer* died inteſtate, and Mr. *Brown*, as her Huſband, obtained the Adminiſtration of her Effects. Lady *Mayo* had proved herſelf to be the Daughter of Mrs. *Ailmer*, and had cited *Brown* to bring in the Adminiſtration, and ſhew Cauſe why it ſhould not be revoked, as unfairly obtained. *Brown* proved his Marriage to Mrs. *Ailmer* beyond a Doubt; but Lady *Mayo* then alleged, that *Brown* had been married to one *Ellen Cutts*, who was living at the Time of the Fact of the Marriage of *Brown* with *Ailmer*. *Brown* anſwered, that *Ellen Cutts* did once make Pretenſions to him; but that in a Suit of Jactitation, brought by him againſt her in the Court of the Biſhop of *London* in 1732, ſhe was injoined Silence by Sentence; and he was pronounced free from any Matrimonial Connection with her. To this Lady *Mayo* replied by Plea, that the Sentence had been obtained by Colluſion between *Brown* and *Cutts*, and deſired to be ſuffered to prove her Allegation.

Many of the Arguments were then uſed, which have been made Uſe of on the preſent Occaſion; but the Judge did not, as I underſtand, reject the Diſtinction between receiving Evidence in Favour of an injured Perſon and being able to annul the Sentence, and abſolutely deny his Authority to admit Lady *Mayo*'s Allegation, but only appeared to make Choice of the Method of ſtopping the Cauſe in the Prerogative Court till Lady *Mayo* had applied to the Biſhop of *London*'s Court for Relief: And in ſo doing he laid great Streſs on the Note in the Margin of *Strange*'s Reports, Page 981, where it is ſaid, that the Chief Juſtice of the Common Pleas, in the Caſe of *Prudham* and *Phillips*, held a Sentence in the Eccleſiaſtical Court to be concluſive, and would not receive Evidence of Fraud or Colluſion in obtaining it. But it is evident from the very able Manuſcript Note of the Caſe of *Prudham* and *Phillips* by the late Mr. *Ford*, whoſe Learning and Accuracy are

too well known to ſtand in Need of any Encomium, that the only Reaſon why Chief Juſtice *Willes* refuſed to ſuffer Mrs. *Phillips* to relieve herſelf by giving a Proof of Colluſion in the Biſhop of *London*'s Court, was, becauſe Mrs. *Phillips* herſelf was a Party to that Suit in the Eccleſiaſtical Court: So that in Truth and Fact the Decree made in the Prerogative Court in *Mayo* and *Brown*, appears to have been founded more on the uncertain Authority of the *Note* in the Margin of Sir *John Strange*'s Reports, than on any other Precedent.

Now if a Suggeſtion of Fraud in a ſingle Perſon, or Colluſion between many, affords a Foundation for a Court, in which Cauſes of Property only are decided, to receive Evidence, that ſuch Fraud or Colluſion was uſed in obtaining a Sentence in another Court which has Juriſdiction in Caſes of Property, it becomes neceſſary *a fortiori*, that a Court, held for the Puniſhment of Criminals, ſhould admit Evidence to ſhew, that a Fraud or Forgery has been committed in a Court of Civil Juriſdiction: And there are ſtrong Inſtances in the Law of *England* to ſhew, that Civil Judgments have been regarded not only as of no Weight to exculpate in Criminal Proſecutions, but on the contrary as Aggravations.

The Caſe of *Farr* in *Kelyng*'s Reports is One of many ſtrongly to this Purpoſe.

Richard Farr, having an Intention to rob the Houſe of Mrs. *Stanier*, told an Attorney that Mrs. *Stanier* was his Tenant, and he could not make her quit his houſe: The Attorney proceeded regularly in a Cauſe of Ejectment; and one *Eleanor Chadwick*, an Accomplice with *Farr*, having ſworn falſely that ſhe had ſerved *Stanier* with a Copy of a Declaration, Judgment was obtained, a Writ iſſued, the Woman was ejected, and her Houſe was robbed by *Farr* and *Chadwick*, who had got legal Poſſeſſion. *Farr* and *Chadwick* were afterwards indicted at the *Old Bailey*, and on Proofs given of the Facts, it was agreed by Lord Chief Juſtice *Hyde*, Sir *John Kelyng*, and Mr. Juſtice *Wild*, that though the Priſoners made uſe of the Law, and the Officers of the Law, yet as this was done *in fraudem Legis*, the Courſe they had taken was ſo far from excuſing the Robbery, that it heightened the Offence by abuſing the Law. *Kelyng*'s Reports, Page 43, 44.

There is a ſingle Caſe on the other Side, *the King* againſt *Vincent*, reported in *Strange*, 481, where it is ſaid, that *Vincent* was indicted for forging a Will of a Perſonal Eſtate, and that the Forgery was proved at the Trial, but that *Vincent* having produced the Probate, it was held to be concluſive in Support of the Will.

This Opinion is ſaid to have been given in the 8th Year of *George* I. and no ſubſequent Caſe has been quoted in Support of it; but Numbers of other Caſes have been quoted by the Counſel againſt the Lady at the Bar, where the unfortunate Priſoners have been found guilty of forging Wills, in Part upon the ſame Evidence (namely, the Probate) on which the very fortunate Mr. *Vincent* was acquitted.

Among others cited from the State Trials and Seſſion Papers, the Caſe of one *Stirling* has been mentioned, and a ſtronger to ſhew the Abſurdity of the Doctrine held in *the King* and *Vincent* could not well be imagined:—One Mrs. *Shuter*, being known to have Money in the Funds, *Stirling* forged a Will for her; he gave conſiderable Legacies to ſeveral, but to himſelf he gave 30l. only as Executor; for it was ſufficient for his Purpoſe to get Poſſeſſion, in order to make her whole Fortune his own: He obtained a Probate from the Prerogative Court, and endeavoured to receive her Stock at the *South Sea Houſe*, but was diſcovered in the Attempt, and indicted for the Forgery; the Probate was produced in Court, and according to the Doctrine in *the King* and *Vincent*, the Sight of the Probate ſhould have inſtantly occaſioned the Acquittal of the Priſoner; for though Mrs. *Shuter* herſelf was alive, and appeared in the Court, yet Witneſſes muſt have been neceſſarily produced to prove her Identity; and ſuch Evidence, according to the Doctrine in *the King* againſt *Vincent*, ought not to have been admitted againſt the Probate, which ought to have been concluſive. The priſoner however was convicted.

But admitting for a Moment, that the Caſe of *the King* and *Vincent* was legally determined, it does not ſeem to apply in the preſent Inſtance, unleſs it could be ſhewed, that the Proſecutor offered to give Evidence of Colluſion in obtaining it, and was not permitted ſo to do; for it was ſaid by One of the Civilians, that the Probate iſſued in that Caſe by a Decree of the Eccleſiaſtical Court, and not in common Form. If it did ſo iſſue, it is to be preſumed, that ſuch Decree was made between Parties truly adverſe till the contrary is made to appear; and the contrary was not attempted to be proved; and it muſt be confeſſed, if the Parties to the Suit in the Prerogative Court were truly adverſe, that then the Fraud either was or might have been in Proof before the original proper Court, and this might have afforded ſome Colour for ſaying, the Man ſhall not be put Twice upon his Trial for the ſame Offence; though ſuch an Argument could only have been ſpecious; for when the Queſtion in a Court of Civil Juriſdiction is, *Will* or *no Will*,

Deed

Deed or *no Deed*, and a Forgery is detected, the Perſon who committed that Forgery, muſt be tried for it in another Court and by another Proceeding, or he will never be puniſhed as the Law of *England* directs.

It may be here proper to obſerve, that no One Caſe has been mentioned by the Gentlemen on the other Side, where, in any Court of Civil or Criminal Juriſdiction, a Proof of Colluſion in another Court had been offered by a proper Perſon and not received or rejected. The Caſe of *Hatfield* and *Hatfield* in the Houſe of Lords in the Year 1727 has been anſwered by all the Counſel who have preceded me, by ſhewing that Colluſion was not at Iſſue in that Caſe. And in the Caſe of *Kenn*, 7 *Coke*, ſo much inſiſted on by Doctor *Winne*, there is no mention nor the leaſt Hint given of Fraud, Covin, or Colluſion. In that Caſe *Chriſtopher Kenn* had Iſſue *Martha* by *Elizabeth Stowell*, but he afterwards obtained a Sentence in a Cauſe of Nullity againſt *Elizabeth Stowell*, as having been married to her *infra nubiles annos*; and the Marriage was pronounced void in an Eccleſiaſtical Court.

Martha, the Daughter of that Marriage, in order to make good her Title to her Father's Eſtate, was afterwards permitted, and probably through ſome Miſtake or Haſte in the Court of Wards, and without hearing Counſel, to give Evidence that *Kenn* and *Stowell* her Father and Mother were not *infra nubiles annos* when they intermarried. But according to Lord *Coke*'s Report the Court of Wards agreed, that as the Eccleſiaſtical Judge had decreed the Marriage to be void, his Judgment ſhould be credited, although the Parties were proved to have been of the Age of Conſent, and although the Foundation was falſe on which the Sentence had been grounded; inaſmuch as the Court of Wards would not examine into the Cauſe or Reaſons of the Sentence, whether true or falſe.

From all which nothing farther is to be collected, than that a Sentence in the Eccleſiaſtical Court is to have full Credit given to it as long as it ſubſiſts unrepealed; and that it is not to be overturned in the ſame Court where it was given, or by any other, on account of Error and Miſtake in Law or Fact; and this is certain Law: But it is to be obſerved, that the Parties divorced had been long dead before the Suit was commenced, and that there is not the remoteſt Hint or Suggeſtion through the whole Caſe, that the Eccleſiaſtical Court had been deceived by any Fraud or Colluſion between the Parties litigant.

As to the Caſe of *Prudham* and *Phillips*, the Counſel for the Lady at the Bar were certainly led into a miſtake by the Note which I have already mentioned, inſerted in the Margin of *Strange*'s Reports, Page 961, and were not aware of the Note in Mr. *Ford*'s Manuſcript, which is of undoubted Authority, and from which it appears That one Mr. *Prudham*, as a Creditor, brought an Action of Debt in 1737 againſt the well-known Mrs. *Tereſia Conſtantia Phillips*.

Mrs. *Phillips* gave in Evidence her Marriage with Mr. *Muilman*.

Mr. *Prudham* produced a Sentence annulling that Marriage in a Cauſe of Nullity on account of a prior Marriage with one *Delafield*; and this Mr. *Prudham*'s Counſel relied upon as concluſive Evidence of the Nullity of the Marriage with *Muilman*;—and ſo it was ageed, unleſs the Defendant *Phillips* might be admitted to ſhew Fraud in obtaining the Sentence, and ſo to avoid it, as Judgments are daily avoided, by Replications of Fraud.

" Reſolved, on great Debate, that the Eccleſiaſtical Law was Part of the Law of the " Land, and that Sentences by their Judges were in Matters of Spiritual Juriſdiction of " equal Force with Judgments in Courts of Record and in Courts of Equity: But that " whatever Objections would avoid a Judgment, the ſame would be ſufficient to overturn " a Sentence in the Spiritual Court, but none other. That Fraud uſed in obtaining " Judgments was a Deceit on the Court, and hurtful to Strangers, who, as they could " not come-in to reverſe or ſet aſide the Judgment, muſt of Neceſſity be admitted to aver " it was faudulent.

" But that Mrs. *Phillips* had been a Party in the Cauſe in the Eccleſiaſtical Court, and " whether ſhe was impoſed upon, or joined in deceiving the Eccleſiaſtical Court, this is not " a Time or Place for her to redreſs herſelf."

Now, although Mrs. *Phillips* was not in this Caſe allowed to allege, that the Suit in the Eccleſiaſtical Court annulling her Marriage was colluſive, yet the Reaſon, on which the Court refuſed to allow her ſo to do, namely, her having been a Party to the colluſive Suit, amounts to a full Proof, when joined with the other Doctrine laid down by the Court and related in the Caſe, that any Perſon not having been a Party would at all Times be permitted in a Court of Common Law or Equity to allege Fraud or Colluſion to have been practiſed to his Injury in an Eccleſiaſtical Court.

On

On the Whole therefore it appears beyond a Doubt from the Inſtances which have been given, that in Civil Caſes a Stranger is admitted in One Court to allede and prove in his Defence, that a Sentence to his Prejudice has been pronounced in another Court by Means of Fraud and Colluſion; and that a Proſecutor in a Criminal Proſecution is conſtantly permitted to do the ſame.

Taking it then for granted, that this in general muſt be conceded, it only remains to inquire, why Evidence, if neceſſary, ſhould not be admitted to deſtroy the Force of the Sentence in the preſent Caſe, in Favour of the Crown and of the Publick, who were not Parties to the Jactitation Suit between Mr. *Hervey* and the Lady at the Bar, and yet are intereſted, if it is a Crime to marry a Second Huſband whilſt the Firſt is living; or, in other Terms, to inquire why a Sentence of Jactitation of all Sentences ſhould be ſo highly diſtinguiſhed on account of its Worth and Stability, as to be held forth as an Exception to the general Rule, and as the only Species of Sentence which ought to be ſo favoured and honoured by being regarded as concluſive.

That the Proceedings in the Eccleſiaſtical Court are often rather of longer Duration than could be wiſhed, is not to be denied; and that this principally ariſes from the Number of poſſible Appeals under particular Circumſtances from the firſt Hearing of a Cauſe to what in general Cafes may be termed the laſt, is equally true.

When a Sentence [for Example] given in a Cauſe of Jactitation, in which Marriage was at Iſſue, has paſſed through all the Stages of Appeal, the Cauſe is ſtill liable to be opened *de novo* in Favour of Matrimony, as if nothing had been done. Was this poſſible Prolixity of Proceeding, and were theſe Opportunities of appealing an Impediment and Safeguard againſt Colluſion (as One of the Doctors has gravely alleded them to be) I do not deny that a Cauſe of Jactitation muſt of all Cauſes ſtand faireſt to be the moſt immaculate and moſt free from the Stain of Fraud. But, when it anſwers the Purpoſe of Parties to collude, is it to be preſumed that thoſe, who could begin a Cauſe colluſively, would ſcruple to carry it on from one Court to another, till they came to the End of their Journey, if it was neceſſary ſo to do to obtain their End? The Truth however is, that ſeveral Appeals are not abſolutely neceſſary; and that, when there is Colluſion in a Cauſe, there is either no Appeal, or an oſtenſible One only, which is always ſubducted within a convenient Time; and the Gentlemen beſt know, whether an Appeal from the Sentence relied on in the preſent Caſe was ſubducted or not. A Sentence in Jactitation pronounced in Disfavour of Matrimony is defined to be tranſitory, and not final; and this Definition ſeems to be founded, as Abſurdities ſometimes are, on a Tenet of Religion;—the Religion I mean is that, which after having been received in this Kingdom for a long Series of Years, was afterwards and now is with reaſon proteſted againſt. In this Religion it is maintained, among other condemned Doctrines, that Marriage is a Sacrament, and not to be diſſolved: And although it nearly amounts to a Certainty, that the Rites of Matrimony are not now quite ſo ſtrictly regarded in *England* (as they have been heretofore) and that his Majeſty's Subjects of almoſt every Deſcription from the loweſt to the higheſt have ſhewed an utter Abhorrence of this Doctrine of the Church of *Rome*, yet it is not to be wondered-at, that the antient Canoniſts, who were to a Man of the Religion I have juſt mentioned, and had the framing of the Code Eccleſiaſtical, ſhould ſo fabricate or bend the Law, as to render it the Support of Marriage by every poſſible Method, and ſhould lay it down as a Maxim, that a Sentence in a Marriage Cauſe ſhould never, in their Language, paſs into *Rem Judicatam*, or become a final Judgment, but be eternally open and liable to Reviſion and Reverſal, notwithſtanding it may have been eſtabliſhed by Appeal upon Appeal, and even by the Judges of the Common Law in a Court of Delegates under the King's Special Commiſſion, and afterwards by the Lord Chancellor, who may have refuſed a Commiſſion of Review. *Clarke's Praxis, Title* 205.

To render the Privilege of a Jactitation Cauſe, in which the Proof of Marriage has been attempted but not perfected, ſtill more extenſive, the general Safeguard againſt Perjury has been entirely taken away in this Species of Suit; for the Publication of the Depoſitions is no Obſtacle to freſh Examinations, and new Witneſſes may continually be admitted in Favour of Matrimony, even after the former Depoſitions have been inſpected, and without any Proof made that ſuch Witneſſes are lately come to the Knowledge of the Producer; which is a Proof expected and required in all other Cauſes whatever, and a Rule never departed from.

Clarke in his Book of Practice is expreſs to this Purpoſe, and uſes the following Words: *Licet generaliter non admittuntur teſtes poſt Publicationem, admittuntur tamen in Cauſa Matrimoniali ſine Juramento, quod teſtes noviter ad notitiam pervenerunt.* Tit. 205. It is allowed

allowed too in this Species of Cauſe, that not only the Party ſilenced, but that any other Perſon, intereſted to eſtabliſh the Matrimony, may take up the Cauſe in the State in which it was left in the ſame Court, and proceed, as I apprehend, in another Court, and invocate or illate the Proceedings.

The *Pars Citata*, or Defendant, is alſo at Liberty to go into another Court in a new Matrimonial Cauſe; as for Example, in a Cauſe of Reſtitution of Conjugal Rights: *Licere Parti citatæ aut in eodem judicio, aut coram alio judice (non obſtante quod citatio emanavit in Cauſa Jactitationis) contra actorem inſtituere Cauſam Matrimonialem.* See Clarke's Praxis, Tit. 195, 205.

This ambulatory, indeterminate, State of a Sentence in Jactitation muſt certainly, in the Apprehenſion of any Man not a Lawyer, be a very improper Circumſtance to be urged in order to render this Species of Sentence given in One Cauſe an abſolute Bar to proceeding to Judgment in another Cauſe of a Civil Nature, and more particularly to make it a Bar in a Cauſe of a *Criminal Nature* in another Kind of Juriſdiction: Taking Things therefore as they are, and having proved the Law reſpecting this extraordinary Species of Sentence from the Books of Practice which deſcribe it, can any good Reaſon be aſſigned why ſuch a Sentence ſhould be concluſive in the preſent Caſe, and ſhould not be reviſed and revoked, if Occaſion ſhould require it, in the High Court before which we now are?

This Sentence never paſſes into a *Rem Judicatam*, or Final Judgment—it is ſubject to be reviſed in any other Court having Juriſdiction than that in which it was firſt given. The Act of *James* I. by which the Marrying of a Second Huſband or Second Wife, whilſt the Firſt is living, is made Felony, has by creating the Felony plainly transferred that Branch of the Eccleſiaſtical Juriſdiction, which before puniſhed Polygamy, to thoſe Courts where Criminals are tried; and to remove even the Appearance of any Difficulty which might have ariſen on the Right of the Proſecutor to offer the Sentence, the Counſel for the Lady have themſelves deſired Leave on her Part to bring it before the Court, and have actually introduced it:—Can it therefore be poſſible that this High Court ſhould not think themſelves authorized by a complete Juriſdiction in every Reſpect, Spiritual as well as Temporal, to give the Proſecutor, on the Part of the Crown and of the Public, the Liberty, under all the Circumſtances of this Caſe, of offering a Proof of the Nullity of the Sentence, by pointing out from the Proceedings themſelves, if Neceſſity ſhould require it, the Marks of Fraud, with which they abound; or, what is rather to be expected, to give the Proſecutor the Liberty of adducing Evidence in a more direct Manner, both oral and inſtrumental, to prove the Marriage of the Lady at the Bar with Mr. *Hervey*, the preſent Earl of *Briſtol*; by which the colluſive Proceedings before the Eccleſiaſtical Court, and the Truth of the principal Accuſation, will at one and the ſame Time be plainly demonſtrated?

Lord Preſident of the Council. My Lords, I move your Lordſhips to adjourn to the Chamber of Parliament.

Lords. Ay, Ay.

Lord High Steward. This Houſe is adjourned to the Chamber of Parliament.

The Lords and others returned to the Chamber of Parliament in the ſame Order they came down; and the Houſe being thus reſumed, Reſolved to proceed further in the Trial of *Elizabeth* Ducheſs Dowager of *Kingſton* in *Weſtminſter Hall* on *Friday* next, at Ten o'Clock in the Morning.

FRIDAY, April 19. *The Third Day.*

THE Lords and others came from the Chamber of Parliament in the ſame Order as on *Tueſday*; and the Peers being ſeated, and the Lord High Steward in his Chair,

Lord High Steward. My Lords, The Houſe is reſumed. Is it your Lordſhips Pleaſure the Judges may be covered?

Lords. Ay, Ay.

Then the Serjeant at Arms made Proclamation for Silence; and the Ducheſs of *Kingſton* was conducted to the Bar.

Lord High Steward. Mr. *Wallace*, you may proceed with your Reply.

(REPLY.)

Mr. Wallace.

My Lords,

I muſt beſpeak your Lordſhips Indulgence to examine and diſcuſs the great Variety of Arguments and Conſiderations, which the Counſel on the Part of the Proſecution have thought proper to enter into, and ſubmit to your Lordſhips. I ought in the firſt Place to take ſome Notice of the Charge of Novelty imputed to myſelf, and thoſe who aſſiſt me, in the Attempt to introduce the Sentence of the Eccleſiaſtical Court, before the Cauſe has been opened, or the Evidence on the Part of the Proſecution ſtated to your Lordſhips.

It might perhaps be thought a ſufficient Anſwer to obſerve, that no Indictment ever yet has been preferred on this Statute, where the Eccleſiaſtical Court had given a Sentence upon the Subject. The Proſecutor of this Indictment has had the Boldneſs to ſet at Defiance the Proceedings in the Eccleſiaſtical Court; and, in direct Oppoſition to a Sentence pronounced there, to prefer in a Court of Criminal Juriſdiction a Charge of Felony; for although Criminal Proſecutions are and muſt be in the Name of the Crown, yet in moſt Caſes they are carried on by private Individuals; and your Lordſhips particularly know, in the preſent Caſe, there is a private Proſecutor, and one, who might have applied on the Score of Intereſt to the Eccleſiaſtical Court to have had that Sentence re examined.

With Reſpect to the Novelty of the Proceedings, the Counſel for the noble Lady at the Bar would have found themſelves ſtanding much in Need of your Lordſhips Pardon, if they had not interpoſed the Sentence at the Time it was offered. If they had permitted a Cauſe of this Kind to have proceeded into Evidence (which, from the Accounts we have heard, is to be laid before the Court by a Number of Witneſſes, and of courſe muſt have taken up your Lordſhips many Days in the Examination); and after all the Sentence had been produced and attended with the Effect, which we hope hope it will have; what would have been the Situation of Counſel, who had ſuffered ſo much of your Lordſhips Time to have been miſpent in the Examination of parol Evidence to Facts, which could not be admitted againſt the Deciſion offered to your Lordſhips?

But in Truth it is not new in Practice; the Caſe alluded to is not only, as it has been termed, a Colour, but a Juſtification for what has been done. It is true, it was an Ejectment, which the Gentlemen have properly called a fictitious Proceeding. It was for that Reaſon the Sentence was not interpoſed, till the Evidence was opened; for till then the Defendant is ignorant in what Manner the Plaintiff intends to make out his Claim; but as ſoon as it was ſtated, that he derived through a Marriage, which had been examined and decided in the Eccleſiaſtical Court, the Counſel immediately, without ſuffering Evidence to be given, interpoſed the Sentence. In this Caſe there is no Occaſion to wait for the Opening of Counſel; for upon the Face of the Indictment the ſuppoſed Marriage with Mr. *Hervey* is ſtated as the Ground of the Offence: The Crime in the Indictment charged is a Marriage with his Grace the Duke of *Kingſton*, during the Life of Mr. *Hervey*, to whom the noble Priſoner at the Bar is alledged to have been before married; and conſequently upon the Validity of that Marriage the Queſtion depends. The Marriage with the Duke of *Kingſton* was notorious in the Face of the Church, under the Sanction of a Licence from the Archbiſhop of *Canterbury*, and in the Preſence of many Witneſſes. The ſuppoſed Marriage with Mr. *Hervey* was the ſole Queſtion in the Eccleſiaſtical Court: That Court has decided againſt it; and as long as that Sentence remains in Force, the Relation of the Parties as Huſband and Wife is at leaſt ſuſpended, if not abſolutely gone.

The Practice every Day, where One is in Poſſeſſion under a Fine, and no Claim has been made for Five Years, is to interpoſe it immediately. I ventured to do it not long ago in the Court of King's Bench at a Trial at Bar, where the Claimant came out of *Wales* with as long a Pedigree as that Country could furniſh: When I heard it ſtated, and underſtanding that a great Number of Witneſſes muſt be called to ſupport it, I offered the Fine to the Court, before a Witneſs was called; which inſtantly put an End to the Cauſe. I did not by that incur any Cenſure from the Court, or Blame from the Counſel. I thought myſelf called upon in Duty to inform the Court of it; and a Cauſe, which would have laſted Three or Four Days, was ended in leſs than Ten Minutes.

I truſt, a Conduct deſigned to prevent your Time being miſpent upon a fruitleſs Enquiry, (for whatever ſhould be the Reſult, yet this Sentence, if it has the Effect we contend for, muſt render it totally nugatory and immaterial) will not be the Subject of your Lordſhips Animadverſion.

Enough,

Enough, I hope, has been ſaid in Defence of the Attempt againſt the Charge of Novelty; but an Obſervation was made, to create a Prejudice againſt the Caſe of the noble Lady at the Bar, from the Conduct of her Councel in this Stage of the Proceedings to prevent an Examination of Witneſſes, as a Proof of their Opinion upon the Merits of the Cauſe. God forbid that any Impreſſion ſhould be made againſt the noble Priſoner at the Bar from the Conduct of her Counſel! Your Lordſhips know, that in the Forms of Proceeding ſhe muſt throw herſelf upon her Counſel, and ſubmit to their Management; and no Miſtake of theirs will, I truſt, ever turn to her Prejudice. I feel an Happineſs in ſpeaking to a Court incapable of receiving Impreſſions from an Inſinuation of that Kind.

An Obſervation was made upon the Form of the Sentence, which ſeemed to ſtrike many of your Lordſhips; that as far as it appeared to the Eccleſiaſtical Court, the Parties were free from all Matrimonial Contracts and Eſpouſals; not poſitively that they were ſo; and therefore as far as the Evidence went in that Court, and no farther, ought the Sentence to be regarded. Your Lordſhips have heard from thoſe that practiſe in the Courts o Eccleſiaſtical Law, from the Counſel on both Sides of that Deſcription, that it is the conſtant uniform Method of drawing up Sentences in Cauſes of this Kind; that it is a Sentence of Validity; that it is conſidered by them as ſuch; but that it is open to further Proceedings in that Court; that it falls within the Maxim, which was cited to your Lordſhips upon the other Side, which is not denied here, but admitted, nay mentioned in the very Opening of this Buſineſs; that *Sententia contra Matrimonium nunquam tranſit in Rem judicatam*; this Sentence, being againſt a Marriage, never paſſes into a definitive Judgment of that Court: But does it follow, becauſe it is open to further Examination, becauſe other Suits may be inſtituted which may contradict this Sentence, that whilſt it remains unimpeached, till other Suits are inſtituted, and till a different Judgment is given, that the Sentence has no Effect; that it is the Words of the Judge, without having any Sort of Conſequence attending of them?

My Lords, It is too ridiculous to ſuppoſe a Suit inſtituted in the Eccleſiaſtical Court, where the Proſecutor of the Suit (or the Promoter, in the Language of that Court) has obtained the Sentence of the Court in his Favour, that it means nothing at all; that it is meer Waſte-Paper; that he might as well never have commenced the Suit. Is it poſſible in a Country, where the leaſt Idea of Juſtice prevails, that this ſhould be the Caſe? On the contrary, the Sentence of every Court of competent Juriſdiction has been conſidered in the ſame, and every other Court where it has become the Subject of Debate, till impeached, ſet aſide, reverſed, or repealed by the Court that gave the Sentence, or by the Authority of a Court of Appellant Juriſdiction, to be concluſive.

Your Lordſhips have heard from the Doctors of the Civil Law the Effect of a Sentence in a Suit of Jactitation of Marriage. I took the Liberty of ſtating to your Lordſhips many Caſes referring, where the ſame Doctrine had been adopted by the Judges of the Common Law, and conſtantly acted upon without an Exception. The Proceeding is not, as has been contended, in the Nature of an Action for Words, or of Slander; it has ever been inſtituted upon ſome ſerious Claim of Marriage, which calls upon the Party for an Explanation.

Would it be no Objection with a Lady to a Gentleman paying his Addreſſes to her, that ſomebody claimed a Marriage with him? I believe, my Lords, it would at leaſt create a Pauſe in the Treaty, if it did not abſolutely put an End to it. He certainly would be called upon by the Lady or her Friends to ſatisfy them, that there did not exiſt a Ground for ſuch Report. There is no legal Courſe to be taken, but by commencing a Suit of Jactitation in the Eccleſiaſtical Court. The Proceeding calls in Form upon the Party, who has made the Claim, to juſtify it. If a Marriage be inſiſted on, the Parties inſtantly change Situations; the Defendant becomes the Plaintiff or Actor, and the original Plaintiff becomes the Defendant, and is called upon to anſwer that Claim made in the Eccleſiaſtical Court of Marriage, not only to anſwer it in Form, but upon Oath: The original Plaintiff is obliged on Oath to declare, whether the Allegations of the Party reſpecting the Marriage are true or falſe. The Proofs are firſt made by the Party inſiſting upon the Marriage; and the Judge gives Sentence upon them. The Suit in Truth becomes, and is admitted by the learned Doctor on the other Side to be, to all Intents and Purpoſes, a Matrimonial Cauſe; and the Judgment is upon the Validity and Lawfulneſs of the Marriage. In that Light the Proceeding in the Eccleſiaſtical Courts has ever been received and treated.

But ſuppoſe the Sentence has been received and conſidered as concluſive Evidence, it is contended by the Counſel for the Proſecution to be only in particular Caſes, namely, where the

the Perſon againſt whom the Sentence has been given, or one deriving under ſuch Perſon, has been a Party in the Suit, in which the Sentence has been offered in Evidence; which is not the preſent Caſe, as the Crown was no Party to the Suit in the Eccleſiaſtical Court.

The Diſtinction may be thought ingenious and plauſible; but there is no Foundation in Law to ſupport it. In the great Number of Authorities cited to your Lordſhips, there is not the leaſt Hint of ſuch a Diſtinction: The Rule is laid down in the moſt general Terms, and without an Exception, in the Caſe of *Hatfield* and *Hatfield* before the Houſe of Lords. The Perſon againſt whom the Sentence was given in Evidence, was not a Party, nor claimed under any Party, to the Suit in the Eccleſiaſtical Court.

No Notice was taken of another Caſe which I mentioned to your Lordſhips, where the Perſon againſt whom the Sentence was given in Evidence, was no Party to the Proceedings in the Eccleſiaſtical Court. It was an Action againſt Mr. *Thomas Hervey* for a Debt contracted by his Wife. Mr. *Hervey* had a Judgment in that Suit againſt him: But in a ſubſequent Suit, after a Proceeding had in the Eccleſiaſtical Court, in which it was declared that Mr. *Hervey*, as far as appeared to the Court, was free from all Matrimonial Contracts (juſt as it is in the preſent Caſe) the Sentence was received as concluſive Evidence upon the Fact of the Marriage, and defeated the Plaintiff.

I am not contending, that ſuch Sentences are to be uſed as Inſtruments of Frauds upon Creditors. No; if there is no real Marriage, but a Man holds out to the World a Woman for his Wife, and ſhe gets a Credit upon that Score, he ſhall never be permitted to ſay they are not married: Yet where the Perſons live ſeparate, where no Act of his gives a Countenance to the Demand, there a Creditor truſts the Wife upon the Ground of a legal Marriage; there the Eccleſiaſtical Court deciding upon the Marriage is concluſive Evidence. That Caſe was acquieſced in; no Application was made to the Court; and I believe all that heard it approved of the Deciſion.

A learned Friend of mine on the other Side, after he had as I thought cloſed his Argument and ſat down, roſe again to mention a Caſe to your Lordſhips of *Crutchley* and *Robins*.

It muſt have ſtruck him that it would appear a little extraordinary, after ſo full a Diſcuſſion, no Caſe had been cited to your Lordſhips to warrant or give a Colour to the Diſtinction attempted.

That Caſe, when ſtated, and the Reaſons given by the Court which pronounced the Judgment conſidered, will appear not to have the leaſt Application to the preſent. It was a Claim of Dower by Mrs. *Robins* upon the Eſtate of Mr. *Robins* deceaſed, in *Staffordſhire*: The Defendant in that Caſe, the Heir of Mr. *Robins*, pleaded to that Claim, that ſhe never was lawfully married to Mr. *Robins*. The only legal Mode of trying that Fact is by a Certificate from the Biſhop of the Dioceſe: The Pleading between the Parties is brought to an Iſſue; it is the Office of the Court to direct a Writ to the Biſhop to certify whether there was a Marriage or not; and upon the Certificate, the Judgment is given. Inſtead of ſuffering the Court to iſſue a Writ to the Biſhop, Mrs. *Robins* replied to that Plea a Sentence in the Eccleſiaſtical Court in a Suit, wherein ſhe was by the Judgment of that Court pronounced the Wife of Mr. *Robins*; the Defendant put in a Demurrer, inſiſting the Replication was not admiſſible: And that was the Queſtion before the Court of Common Pleas.

Did the Court of Common Pleas decide, that ſuch a Sentence is not Evidence? No; the Court of Common Pleas determined, that by Law they could receive no other Evidence of the Fact than the Biſhop's Certificate; it was the ſole Proof which the Law in that particular Caſe has required for the Deciſion of the Cauſe, and they could not depart from it. But they went farther in that Cauſe; they told Mrs. *Robins* that the Sentence, though it could not be received there, might be laid before the Biſhop, who was to certify to them the Marriage. That is the Language of the Court of Common Pleas upon the Caſe: The Biſhop muſt certify the Marriage; the Sentence muſt be laid before him, and not before this Court. Did the Court of Common Pleas decide, as contended, that it was no Evidence? No ſuch Thing is to be found in the Caſe. All the Court did, or meant to do, was to inform the Plaintiff that ſhe had miſtaken the Time and Place to make Uſe of that Evidence; that the Law had in that Caſe appointed a certain ſpecifick Proof to be given to the Court, and they could receive no other: The Biſhop, who was to examine into the Matter, might or might not be concluded by the Sentence; the Court muſt be determined by his Certificate.

My Lords, If the Biſhop had rejected the Sentence, he would have done what no Biſhop ever did before; yet the Court muſt be concluded by his Certificate; they could not examine

examine into the Proofs: Nay, if the Biſhop by Fraud had certified a Marriage, the Court would have been concluded. So much for that Caſe which has been cited; and which is the only Caſe the Induſtry of the Gentlemen on the other Side could produce upon this Part of the Argument.

Your Lordſhips have been told, that by the general Rules of Evidence in Civil Caſes no Sentence or Judgment can be received, unleſs in a Cauſe between the ſame Parties, or who derive under them. The Candour of the Gentlemen on the other Side has admitted Two Exceptions to the Rule: Firſt, Sentences or Judgments, where the Proceeding is *in Rem*; and Secondly, in Cauſes where the Court has excluſive Juriſdiction.

I will not ſtate to your Lordſhips other Exceptions to the Rule; the Two admitted are ſufficient; the preſent Caſe falls within both Exceptions, though either would be enough.

In the firſt Place, it is a Proceeding *in Rem:* Marriage or no Marriage is the Point to be determined. It does not come collaterally or incidentally, but directly, in Queſtion; and the Deciſion of which was the ſole Object of the Suit.

In the next Place, it is a Sentence of a Court having excluſive Juriſdiction upon the Subject. It is admitted that the Eccleſiaſtical Courts have excluſive Juriſdictions in Probates of Wills, in all Teſtamentary Diſputes reſpecting perſonal Eſtates; and having decided the Queſtion, whether right or wrong, upon true or upon falſe Grounds, it is not competent to any other Court, unleſs in a legal Way by Appeal, to enter into the Matter; but Faith and Credit is to be given to the Deciſion of the Eccleſiaſtical Court. It is alſo admitted, that till the Statute, upon which the preſent Indictment is founded, the Eccleſiaſtical Courts had the ſole and excluſive Juriſdiction in Matrimonial Cauſes.

But it is contended, that a concurrent Juriſdiction is given by this Act to the King's Temporal Courts: Where is the Ground of this Notion to be found? Was it the Intention of the Legiſlature to give to the Temporal Courts a concurrent Juriſdiction with the Eccleſiaſtical? The Intention muſt be collected from the Act itſelf. In my own Apprehenſion nothing is more clear than that the Legiſlature, at the Time of paſſing this Act, meant to guard and ſecure the Juriſdiction of the Eccleſiaſtical Courts againſt Innovation from the Temporal.

The Act is general; that whoever ſhall marry a Second Huſband or Wife, living the former, ſhall be deemed a Felon, and ſuffer the Pains of Death. Yet that general enacting Clauſe is reſtrained by a Proviſo, which demonſtrates the Intention of the Legiſlature, that the Proceedings in Eccleſiaſtical Courts ſhould remain untouched, and the Temporal Courts have no Juriſdiction in the Caſe. The Exception runs thus:—Nothing herein contained ſhall extend to any Perſon or Perſons, that ſhall at any Time of ſuch Marriage be divorced by any Sentence had or ſhall be hereafter had in Eccleſiaſtical Courts; nor to any Perſon or Perſons ———

Theſe Proviſions ſhew an Anxiety in the Legiſlature to preſerve the Privilege of the Eccleſiaſtical Court, and ſave their Judgments from an Examination; and ſo far from giving a Juriſdiction to the Temporal Courts in ſuch Caſes, the Act expreſly declares, that where the Eccleſiaſtical Courts have given a Deciſion, the Temporal Courts muſt ſtop. The Caſe is not within the Law; it is not permitted to be examined into.—It is pretty extraordinary that Hiſtory gives no Account of this Act, or the immediate Occaſion for paſſing it. The Preamble ſtates, that evil diſpoſed Perſons, being married, run out of one Country into another, to Places where they are not known, and marry there. If this was the Evil meant to be redreſſed, the Caſe of a Perſon of Rank, obtaining a Sentence in the Eccleſiaſtical Court, and acting under the Faith of it, can never fall within the Deſcription in the Act.

The Journals of neither Houſe furniſh any Lights upon this Subject. The Act was brought into the Houſe of Commons in *April*, received ſome Amendments in a Committee there, and ſent to the Houſe of Lords; it there alſo received Amendments; and was returned to the Houſe of Commons again in *June:* But what the Amendments were, or whether the Proviſoes were inſerted by the Guardians of the Rights of the Church, as is moſt probable, or came from the Houſe of Commons, cannot be diſcovered. Suppoſe a Sentence of Divorce pronounced in the Eccleſiaſtical Court; would it be permitted to any Court, under Pretence of Fraud, to examine for the Purpoſe of making the Parties Criminals, when the Act has declared ſuch a Sentence ſhall not be meddled with; and the Parties, under ſuch Sentences, are excepted in Terms out of the Act?

Where a Sentence of Nullity of Marriage is given, it is equally open to future Examination in the Eccleſiaſtical Courts with a Sentence of Jactitation. If this be doubted, your

Lordſhips, from the Abilities and Integrity of the Gentlemen who aſſiſt us, though Counſel in the Cauſe, will receive ſatisfactory Information.

A Sentence of Nullity of Marriage is excepted by the Words of the Act: And would it not ſeem extremely inconſiſtent and harſh, that, where a Marriage is doubtful, and the Eccleſiaſtical Courts have declared it null, neither Party can by a ſubſequent Marriage be in the Predicament of a Felon; and yet a Perſon, who is by the Sentence of that Court declared never to have been married at all, and to be free from all Matrimonial Eſpouſals, is to be a Felon? Such a Conſtruction on a Penal Law would be monſtrous.

The Intention of the Legiſlature is to me as clear as Language can make it, that Matrimonial Cauſes ſhould be ſtill within the ſole Juriſdiction of the Eccleſiaſtical Courts; and that the Temporal Courts ſhould have no Authority to examine into their Deciſions; by declaring, that whereſoever theſe Sentences obtain, the Party marrying whilſt they are in Force, ſhall not be a Felon; and yet the former Marriage, if it were a legal one, is not done away: It is capable of being revived, and a Second Marriage would be null and void. And upon another Proceeding, if the Sentence ſhould be in Favour of the Marriage, either Party may commence a Suit for Reſtitution of Conjugal Rights; the Firſt Marriage would be eſtabliſhed, and a Second Marriage, pending the Sentence, void; yet the Party would not be in the Predicament of a Felon. This is clear from the Act of Parliament; and in this Senſe your Lordſhips will give me Leave to uſe it, as ſhewing beyond a Poſſibility of Doubt the Intention of the Legiſlature. Where then are the Arguments we have heard, that the Legiſlature meant in this Caſe to give the Common Law Courts ſuch concurrent Juriſdiction, as to diſregard the Sentences of the Eccleſiaſtical Courts? Has the Legiſlature ſaid ſo? Has not the Legiſlature ſaid the Contrary in expreſs Terms? Wherever a Sentence is pronounced, that Perſon is not to be tried in the Temporal Courts. Is it competent to any Temporal Court? Is it competent to your Lordſhips, the ſupreme Temporal Court in the Kingdom? Awful and great as this Court is, give me Leave to ſay, that the Rules of Conſtruction are the ſame as in the moſt inferior Court of Criminal Juriſdiction. There is not one Law for Peers, and another for Commons, in this Country: The Law is the ſame for both; it only varies in the Circumſtances of the Trial: The Evidence to prove the Guilt or Innocence of the Party is the ſame in all.

There is no Doubt, but the Temporal Courts may try Marriages upon this Act, where no Sentence has been given in the Eccleſiaſtical Court; as they do every Day upon Titles to Lands on Ejectments: But where a Sentence has been obtained againſt, or in Favour of, a Marriage in the Eccleſiaſtical Court, the Temporal Courts are concluded by it.

The concurrent Juriſdiction which they contend for, if I underſtand them right, is this: The Eccleſiaſtical Courts, ſay they, it is true, have a Right to try a Marriage; but the Temporal Courts have alſo a Right to try a Marriage under this Act of Parliament. The Sentence of the Eccleſiaſtical Court will not ſatisfy them; they will have the Evidence; and if they are ſatisfied with the Evidence that the Eccleſiaſtical Courts have thought inſufficient, they will pronounce the Crime, and puniſh the Offender. Can there be any ſuch Poſition warranted by the Act of Parliament?

If the Legiſlature could have foreſeen, that in any Period it ſhould enter into the Head of any Man to ſet at nothing the Juriſdiction of the Eccleſiaſtical Courts, they could not in more poſitive Terms have guarded againſt it.

If the Gentlemen ſhould be able to eſtabliſh a concurrent Juriſdiction in the Eccleſiaſtical and Temporal Courts, they then beg Leave to advance a Step further, and lay down a Rule, which they hope your Lordſhips will adopt to intitle them to enter into Evidence, that Judgments only bind in Courts of concurrent Juriſdiction, where they are juſt.

I deny the Rule in the Extent it has been laid down. Have not the Courts of King's Bench, Common Pleas, and Exchequer a concurrent Juriſdiction in Civil Cauſes? And was it ever heard, when a Judgment of One of the Courts is pleaded in another, that the Propriety and Rectitude of the Judgment can be examined into? Certainly not: The Party is permitted only to deny the Exiſtence of the Judgment. The Caſe of *Sinclair* and *Frazier*, lately determined by your Lordſhips upon an Appeal from *Scotland*, was cited as an Authority for this Purpoſe; in which your Lordſhips ruled, that a Judgment in the Court of *Jamaica* ſhould not be enforced, unleſs it was juſt: That is, if the Defendant in the Cauſe could ſhew it was unjuſt, no Court ought to lend its Aid to carry it into Execution.—My Lords, nothing is more right or juſt; but does it apply to the Caſe before your Lordſhips?

Wherever the Aid of a ſuperior Court is wanted to give Effect to a Judgment of an inferior Court, or of a Court which cannot carry into Execution its own Judgments, from the Parties being locally out of its Juriſdiction, that Court whoſe Aid is prayed ought not to give it, if the Defendant can ſhew the Judgment to be unjuſt;—they will give ſo much Credit to the Sentence of every Court as to preſume it right, unleſs the Defendant can ſhew the Contrary. Not long ago an Application was made to the Court of King's Bench to enforce the Judgment of the Juſtices at the Quarter Seſſions in *Lancaſhire*. An Act of Parliament paſſed for the Incloſure of a Common: By that Act, as the publick Roads are directed to be Sixty Feet wide, the Common was ſmall, ſituate in a very remote Part of the Country, where very few People came but thoſe intereſted in the Lands, and they thought that Roads of leſs Breadth would very well ſuffice for the Occaſions of the Country; the Commiſſioners under that Act of Parliament aſſigned in the Name of private Roads, what in Truth had before been publick, and allotted Half the Dimenſions required by the Act. There was an Application to the Seſſions, who had Juriſdiction, by Appeal; and they ordered the Roads to be opened to the Extent the Act directed: But when they had done that, they were left without the Power of enforcing their Order: They could not compel a ſpecifick Execution of it. If they had proceeded for a Contempt againſt the Commiſſioners by Indictment, that would have been tedious and uncertain: the proper Method was by an Application to the ſupreme Criminal Court of the Kingdom, in which the Super intendance of all inferior Juriſdictions is lodged. A Mandamus was moved for in the King's Bench to enforce the Judgment of the Seſſions. The Court of King's Bench told thoſe who oppoſed the Application, We think ourſelves bound to enforce it, unleſs you can ſhew it to be unjuſt; convince the Court that the Seſſions have done wrong, and we will not lend our Aid: And on that Occaſion a Caſe was cited by the learned Lord at the Head of the Court, which happened in the Time of Lord *Hardwicke*; upon a Decree of the Court of Grand Seſſions of *Wales*, where a Party had removed out of the Juriſdiction of that Court, a Bill was filed in the Court of Chancery to enforce the Decree of the Grand Seſſions; the Defendant by his Anſwer inſiſted, that the Decree was unjuſt, and ought not to be carried into Execution: Lord *Hardwicke* was of Opinion, that if the Defendant could ſatisfy him that the Decree was unjuſt, he would not lend his Aid to enforce it.

Do we apply to your Lordſhips for the Aid of the Court to carry the preſent Sentence into Execution? No; we aſk no Favour; we demand nothing but your Juſtice: We produce the Sentence: We do not aſk for your Aſſiſtance to carry it into Execution; it comes in collaterally; and in ſuch Caſes, whether in the Courts of Law or in the Courts of Equity, the Sentences of the Eccleſiaſtical Court have been conſtantly attended to and been received as concluſive Evidence.

But, my Lords, though Sentences of the Eccleſiaſtical Courts have been ever received as concluſive Evidence in Civil Cauſes, yet it is contended, they are not admiſſible in Criminal Proſecutions. Is it the Genius of this Country to attend more to the Puniſhment of Crimes, than to the Adminiſtration of Juſtice between the Parties in Civil Rights? Is the Diſtinction founded in good Senſe or ſound Policy, that the Sentences of Eccleſiaſtical Courts ſhould not only be received, but be concluſive, in one Caſe, and be no Evidence at all in the other? Your Lordſhips will expect very ſtrong Authorities before you liſten to ſuch a Diſtinction.

Suppoſe in a Criminal Proſecution the Property of Goods ſhould come in Queſtion, and a Sentence of Condemnation in the Court of Exchequer was produced, is there a Doubt of its being received? Where the Proceeding is *in Rem*, the Sentence muſt of Neceſſity be admiſſible and concluſive in all Courts, between all Parties, and on all Occaſions, and to all Intents and Purpoſes. Without it there would be Contrariety of Determinations upon the ſame Queſtion; which would be a Reproach to the Juſtice of the Country.

I troubled your Lordſhips with a Caſe from Sir *John Strange*'s Reports to prove, that the Sentence of the Eccleſiaſtical Court was admiſſible and concluſive in criminal Caſes: That Doctrine is abundantly confirmed by a Caſe in the King's Bench Four Years after; *the King* and *Rhodes*. What is the Anſwer given to the Caſe? The Reporter was a young Man, and therefore he is not to be credited; or his Notes of Caſes after his Death came into the Hands of his Executors, who knew nothing of Law, who publiſh every Scrap of Paper they can find, and give them to the World—to make a Volume; ſo the Authority is got rid of by an Objection to the Youth of the Reporter, and the Manner of the Publication.

If your Lordſhips were inclined to liſten to Objections of this Kind, it would be a curious Enquiry, at what Period of a Lawyer's Life he can take a Note fit to be reported. I confeſs

confeſs I am totally unacquainted with it. Should it be, when he is at the Bar, a young Man, and attending to every Thing that paſſes? Should it be, when he is advanced in Buſineſs? and when the Buſineſs he is concerned in engroſſes his Time? If the Caſe had happened later, your Lordſhips would have been told, Sir *John* was then a Man of Buſineſs; he did not trouble himſelf about taking Notes; they are very inaccurate. If it had been the Note of a Judge taken upon the Bench, I do not know but it might be ſaid of him, what was ſaid of another Judge; Judges are apt to ſleep upon the Bench.

I had the Curioſity to enquire into the Circumſtances of the Report: The Caſe happened when Sir *John Strange* was about Twenty-four or Twenty-five Years of Age; he had been at the Bar Four Years; a Note ſo taken, and preſerved to the Time of his Death, ought not to be ſlightly treated. The Obſervation of the Caſe being publiſhed by his Executors would have been ſpared, had the Gentlemen gone to the Firſt Page of Sir *John Strange*'s Book; for they would have found by a Preface writen by Sir *John Strange* himſelf, when between Fifty and Sixty, that he had collected theſe Caſes, and meant the Publick ſhould have the Uſe of them; that he had been at the Pains of ſelecting thoſe that he thought fit for Publication, and of putting them into Order. It appears he had given ſome of his Notes to a Gentleman, whoſe Servant had clandeſtinely copied and ſold them to Bookſellers; and leſt the Caſes ſo ſurreptitiouſly obtained ſhould be imperfectly given to the Publick under the Sanction of his Name, he was at the Expence of having his Notes tranſcribed under his own Eye; and he ſays, if they ſhould not be publiſhed in my Life-time, they will come perfect into the Hands of my Executors; and of courſe to the Publick. He practiſed in the firſt Criminal Court of this Country with the greateſt Honour and Ability; he had never heard in his Time that the Caſe had been over-ruled or impeached; if he had, his Integrity was ſuch, that the Caſe never would have appeared in his Book; or, if he had inſerted it, it would have been accompanied with a Note, that damned it, or threw a Doubt on its Authority.

There was another Objection to this Caſe; that it muſt have been determined in the Time of the dulleſt Alderman that ever ſat in that Court. Who, my Lords, determine Caſes of this Kind at the *Old Bailey?* Not the Aldermen: They attend indeed; they are fine Pictures, handſome Furniture; they grace and adorn the Court, very reſpectable, of conſiderable Trade; but they do not deal in Law. If they ever ſtudy Law, it is to avoid it; in which they are not always ſucceſsful. The Judges of the Common Law of the ſuperior Courts of *Weſtminſter-hall* decide the Queſtions, which ariſe in Trials there.

Your Lordſhips have been alſo told, that the Authority of this Caſe, if ever it had any, was ſoon put an End to in the Year 1753, in the Caſe of *the King* and *Murphy*; where the Probate of the Eccleſiaſtical Court was ſet at nought; it was nothing more than Paper and Wax, without any Effect: The Caſe of *the King* and *Murphy* was thrown in by Name: A Caſe, the King and ſuch a one, ſhews it to have been a Criminal Cauſe: But it muſt be from a State of the Facts that your Lordſhips muſt diſcover the Application.

I will let your Lordſhips know the State of that Caſe. It was an Indictment for Forging the Will of one *Wilkinſon.* Your Lordſhips have many of you heard of the great Succeſſes of ſome Privateers fitted out in the Year 1746-7, called *The Royal Family Privateers*; they were very ſucceſsful; and they got very ſoon into many Diſputes in the Court of Chancery and Courts of Law. Their Wages and Prize-Money were conſiderable; wicked Men were tempted to endeavour to poſſeſs it. A Sailor in a remote Part of the World is a Being not likely to give himſelf much Trouble about Money: *Murphy*, who was proſecuted at the *Old Bailey*, knowing *Wilkinſon*'s Title to the Prize-Money, had forged a Will of *Wilkinſon*, had got that Will proved, and had received from one *Noades*, the Agent, Part of the Prize-Money of *Wilkinſon*: All went off very well; *Murphy* ſpent the Money; but in a few Months after, Mr. *Wilkinſon* was reſtored to Life; he appeared before the Agent, and demanded his Money: Says the Agent, we have paid your Executor; ſays he, that is pretty odd; I will ſatisfy you I have not been dead; and nobody can prove my Will till I am dead; I inſiſt upon my Money. The Fraud was detected; *Murphy* was apprehended, proſecuted, and convicted.

Would the Gentlemen have had him ſet up the Probate of the Will at the *Old Bailey?* Would they have told *Wilkinſon* to go to the Eccleſiaſtical Court to repeal it? What would *Wilkinſon*, ignorant as he was, ſay? I have heard of Probates of Wills of Dead Men, but never heard of Probates of Wills of Living Men before: The Juriſdiction of the Eccleſiaſtical Courts is to grant Probates of the Wills of the Dead, not of the Living; and therefore the Queſtion could not ariſe.

Another Caſe of one *Stirling* was mentioned: *Stirling* found out, that a Mrs. *Shutter* had Property in the South Sea Stock, and his Scheme to poſſeſs it was like *Murphy*'s: He forged a Will, got it proved, went to the South Sea Houſe, there he exhibited the Probate; they gave Credit to the Death of the Party, and to his being the Executor, and they paid the Money: The Woman, who had nothing elſe to live upon, came to receive her Dividend; the Clerk ſays, your Executor has proved your Will; you muſt be the Ghoſt of Mrs. *Shutter*, not Mrs. *Shutter* herſelf: She was not to be put off in that Way; the Company found out *Stirling*, and brought him to Juſtice: He did not ſay to the Court on his Trial, Do not believe her; no Law ſays you muſt take the Evidence of a Ghoſt; ſhe muſt go into Doctors Commons and reſcind this, before you believe her Evidence. No Court would bear ſuch an Inſult. The Juriſdiction of the Eccleſiaſtical Court does not attach, till the Party is dead: There is no ſuch Thing as a Will for the Prerogative Court to give Effect to, whilſt the Teſtator is living. It was ſaid, the Crime conſiſts in obtaining the Probate; the Will has no legal Effect without it: It is not neceſſary, to conſtitute the Crime of Forgery, that the Will ſhould be proved; if the Will is exhibited as a genuine Will, and the Officers of the Court (what has happened in many Inſtances) ſuſpect a Forgery, they ſtop the Probate; and many have ſuffered without a Probate being granted, the Offer to prove the Will being a Publication of the Forgery.

Two other Caſes, *the King* and *Fitzgerald*, and *the King* and *Carr* and *Richardſon*, were alſo mentioned to your Lordſhips: In neither of theſe Caſes was any Probate produced or inſiſted upon by the Priſoner. One of the Gentlemen, who cited the Caſes, ſuggeſted that Anſwer to them, which was too obvious to be over-looked.

I truſt your Lordſhips are ſatisfied, there is no Ground in Reaſon or Authority for the Diſtinction attempted between Civil and Criminal Cauſes in the Admiſſibility and Effect of the Sentence of the Eccleſiaſtical Court.

I am now, my Lords, arrived at that Point, to which the whole Artillery ſeems to be directed; that the Sentence was obtained by Colluſion.—Your Lordſhips have been told, that a Judgment by Colluſion is *Fabula, non Judicium*; Wax, Paper, Ink, any Thing that you will, but not a Judgment: The Judge does not act, the Judge is impoſed upon; it is of no Effect whatever; in no Court, in no Light, upon no Occaſion, can the moſt ingenious Imagination ſuggeſt a Caſe, in which Colluſion does not affect the Tranſaction; and being once proved, deſtroys it from the Beginning, and as much annihilates it, as if it had never exiſted. This your Lordſhips have been told is the clear ſettled Law of every Court.

I muſt beg Leave to deny the Doctrine in the Extent it is contended for, and to inſiſt before your Lordſhips, that Colluſion cannot be averred againſt this Sentence, either upon the Principles of the Common Law, or the Proviſions of any Statute. By the Common Law of this Country, Proof of Colluſion in ſome Inſtances was permitted to reſcind Tranſactions; the Simplicity of the Common Law, calculated for more honeſt Times, was not equal to all the Arts of Injuſtice, which ingenious Wickedneſs hath produced.

By the Principles of the Common Law, the Perſon permitted to reſcind a Tranſaction on the Score of Fraud or Colluſion muſt have an Intereſt veſted at the Time. This is expreſsly laid down by the Court in *Twyne*'s Caſe, reported by Lord Chief Juſtice *Coke*; where Goods are unjuſtly taken, and ſold in a Market overt by Fraud, to change the Property, the true Owner may retake them;—ſo where a Creditor proſecutes his Debtor to Judgment, and the Debtor ſells his Goods to a Perſon knowing of the Judgment, with a View to defeat the Execution, the Goods may notwithſtanding be taken by the Creditor: In both Caſes an Intereſt was veſted at the Time of the Fraud.

Many Statutes have been made to ſuppreſs Fraud; in *Henry* the IVth's Time, in the different Reigns of the *Edwards*, and laſt of all in the Time of Queen *Elizabeth*; the main Object of which was to enable Perſons, who became intereſted ſubſequent to Tranſactions founded in Colluſion and Fraud, to impeach and reſcind them.

It has not indeed been expreſsly inſiſted, that by the Common Law, independent of Statuteable Proviſions, all fraudulent Judgments were void, and that it was competent to any Perſon to defeat them: The Authorities I have cited, and legiſlative Declarations upon the Subject, prove the contrary. The Statute of 9th *Henry* VIth, C. 11. has already been mentioned; from thence it is clear, the Certificate of the Biſhop, however colluſively or fraudulently obtained, was concluſive between the Parties; and in the Caſe of Baſtardy, a Proviſion is made againſt ſuch Certificates in future: But in other Caſes, as in Marriage, to this Day, and alſo before the Reformation upon the Parties being of a Religious Order, the Certificate was concluſive, notwithſtanding any Fraud or Colluſion.——Colluſive Judgements upon penal Statutes to protect Offenders frequently occur in Practice; and when they are inſiſted on, the Plaintiff has a Right to aver ſuch Judgments to have been obtained

by Fraud and Colluſion. This does not ariſe from the Proviſion of the Common Law, but from an Act of Parliament made in the 4th *H.* VII. C. 20. The whole Statute is material to be attended to. The Title of the Act is, " Actions popular proſecuted by Colluſion ſhall be " no Bar to thoſe which be purſued with good Faith." It recites, that if an Action popular be commenced againſt an Offender by good Faith, then the ſame Offender will delay the Action either by Non-appearance or by Traverſe; and hanging the ſame Action, the ſame Offender will cauſe like Action popular to be brought againſt him by Covin for the ſame Cauſe and Offence that the Firſt Action was ſued; and then by Covin of the Plaintiff in that Second Action he will be condemned either by Confeſſion, feigned Trial, or Releaſe; which Condemnation and Releaſe ſo had by Colluſion and Covin pleaded by the ſaid Offender ſhall bar the Plaintiff in the Action ſued in good Faith: It is therefore enacted, That in future the Plaintiff ſuing in good Faith may aver the former Recovery to have been by Covin and Colluſion; but no ſuch Averment is to be received after a Trial on the Point of the Action, or on the Covin, or Colluſion.

Here your Lordſhips find the Origin of Averments, that Judgments on Penal Statutes were obtained by Colluſion. This Act affirms the Principle of the Common Law, that none but Perſons intereſted were intitled to reſcind Judgments on the Ground of Colluſion. A Penalty given to a common Informer is not veſted in any Individual, till he commences the Action; and conſequently he could not aver Colluſion in a former Judgment: Such Judgment was not then *Fabula*, or waſte Parchment, but of ſuch Effect and Concluſion as called for an Act of Parliament to remedy the Miſchief.

There can be no greater Authority to prove the Common Law of the Land, than a Parliamentary Declaration upon the Subject; this Act furniſhes a moſt explicit and ſatisfactory one. Your Lordſhips will not ſuppoſe an Act was made to remedy a Miſchief, or ſupply a Defect, which did not exiſt. If your Lordſhips refer to the Acts of thoſe Days, you will find them drawn with great Preciſion and Accuracy, and with great Knowledge of the Subject: I will not ſay ſo much for the Acts of the preſent Time.

This Act muſt evince to your Lordſhips, that colluſive Judgments in Courts of Law bound in collateral Suits. Is it then to be wondered at, that there was no Proviſion by the Common Law reſpecting fraudulent Sentences in the Eccleſiaſtical Courts, which had the ſole and excluſive Juriſdiction in themſelves? But it does not follow, that colluſive Practices are to have Effect, or the Parties go unpuniſhed.

A Power is incident to every Court to prevent its Proceedings from being made the Inſtruments of Fraud and Iniquity, and to puniſh the Perſons concerned in the Attempt. It may be done upon the Information of any One, intereſted or not intereſted. The Court is called upon for its own Honour to examine into the Buſineſs.

Your Lordſhips have been told, that the Crown cannot get at the Colluſion; that the Eccleſiaſtical Courts will not attend to the Application of the Crown: If that were the Caſe, it would not follow as a neceſſary Conſequence, that the Crown ſhould be admitted to allege Colluſion here. But has the Attorney General ſurmiſed to the Eccleſiaſtical Court, that there has been ſuch an Impoſition put upon them as is inſinuated? Has the Judge of the Eccleſiaſtical Court told the Attorney General, I cannot attend to the Suggeſtion? No Application has been made to the Eccleſiaſtical Court, either on the Part of the Crown, or by the real Proſecutor in this Caſe, or any other Perſon, though the Duke of *Kingſton* and the noble Lady at the Bar lived together Five Years under the Sanction of a Marriage ſolemnized with the Archbiſhop's Licence, in the Preſence of Friends, and known to the World. Does the Proſecutor ſay, he is actuated by Motives of Juſtice, and allege the ſuppoſed Colluſion newly diſcovered?

A Caſe happened in the Court of King's Bench, which is known to many of your Lordſhips. Mrs. *Phillips* had married Mr. *Muilman*—Mr. *Muilman* had got rid of that Marriage by a Sentence in the Eccleſiaſtical Court, by proving a former Marriage with One *Delafield*.—It was then the Lady's Turn; ſhe meditates getting rid of *Delafield*'s Marriage, by proving that *Delafield* at the Time he married her had another Wife; and ſo the Lady was to fix herſelf upon Mr. *Muilman* in order to give Effect to her Scheme. An Action was brought for a Real Demand againſt her in the Court of King's-Bench by a Brewer, who had got a Note from her for a valuable Conſideration: The Intent of this was to create a Rumour, that *Muilman* and ſhe were married. They might have brought this and a thouſand ſuch Actions, and no Verdict given could be Evidence againſt Mr. *Muilman*; but when Mr. *Muilman* heard of this Proceeding, and the Purpoſe of it, though it could not affect him, he applied to the Court of King's-Bench, not as a Party in the Cauſe, but informed the Court that ſuch a Proceeding was had by Colluſion, that it was an Abuſe of the Court, and ought to be rectified. Lord *Hardwicke* was then at the Head of that Court; he

he conſidered it as a high Contempt of that Court; he attended to the Application of *Muilman*. An Objection had been made by Counſel, that *Muilman* was not to be heard; What! ſaid Lord *Hardwicke*, to inform the Court of a Contempt is he not to be heard? Any Perſon as *Amicus Curiæ* may inform the Court of a Contempt that has been committed. The Court ordered the Record to be taken off the File, and puniſhed the Parties. If the preſent Sentence was by Colluſion, the Eccleſiaſtical Court would eraſe from their Records the Memorial of the Tranſaction at the Surmiſe of an *Amicus Curiæ*; and would not the Eccleſiaſtical Court have thought themſelves honoured with ſuch an *Amicus Curiæ* as his Majeſty's Attorney General?

Great, and perhaps deſerved, Commendation was beſtowed upon the Marriage Act, though, I really confeſs, I did not diſcover the Application. Your Lordſhips were told, that every Woman of eaſy Virtue and of indigent Circumſtances before that Act had an immediate Receipt for the Payment of her Debts by getting married at the *Fleet*. Has the Marriage Act been attended with ſuch beneficial Conſequences to make all Women virtuous, and all Women rich? If that be true, it has much greater Merit than I conceived belonged to it. Did a *Fleet* Marriage diſcharge the Woman from her Debts? The only Change it made in her Situation was this; when married ſhe goes to Gaol in Company with her Huſband, whereas if ſingle ſhe muſt go alone, and truſt to the Company ſhe meets there: And as to future Debts ſhe was not liable, becauſe ſhe was a married Woman; and at that Time the Marriage Ceremony, if performed by a Prieſt, was valid. But is there any Thing in the Marriage Act, which ſays, that a Woman who now marries ſhall not run into Debt? It would be very happy for many Huſbands in this Country, if there could have been an effectual Proviſion of that Kind. Before the Marriage Act a Woman by her Marriage in the *Fleet* was not liable to future Debts; a Woman now by her Marriage in the Church is not liable to future Debts. Has the Marriage Act made it a difficult Matter in this Country to be married? Are there many Obſtacles in the Way? Is there any Delicacy in Surrogates in granting Licences? In Truth, it is as eaſy to get married in a Church as before in the *Fleet*. Suppoſe a Marriage by Banns at a Diſtance from *London*; the Woman comes here and runs in Debt; does any Body in *London* know of her Marriage, though it was in a Church? She has as much Power to run in Debt ſince the Marriage Act as before, and as exempt from the Payment.

Your Lordſhips are told, that a Man and Woman may to Civil Purpoſes and to Civil Duties, by a colluſive Sentence of this Kind, become ſeparated, and no longer Huſband and Wife; but to all the Public Duties they are Huſband and Wife: They cannot abſolve themſelves from Publick Duties; there is no Power upon Earth can do it but the Legiſlature of the Kingdom; and that the noble Lady at the Bar is free to all Civil Purpoſes, but to all Criminal Purpoſes ſhe is a Wife.

I wiſh the Gentleman, who uſed this Argument, had explained himſelf upon the Subject; for I proteſt to your Lordſhips, I am to be informed that there are other Public Duties by Huſband and Wife to be performed, but thoſe in a State of Cohabitation: I have no Idea of any Publick Duties which the State can exact from a Huſband and Wife in any other Situation; and yet, my Lords, nothing is more clear, than if a Man and Woman cohabit together as Huſband and Wife after a Sentence, like the preſent, and whilſt it remains in force, they are puniſhable by Eccleſiaſtical Cenſures.

Are the Publick Duties alluded to the Injunctions found in the Act of Parliament, that no Man ſhall take another Wife, or any Woman another Huſband, living the former? The Act does not mean to puniſh all ſuch Acts; for in the firſt Place the Act ſays, that it is competent to any Man, without becoming a Felon or the Object of Puniſhment by the Act, to marry a Second Wife, provided his Firſt Wife is beyond the Seas for Seven Years together, though the Huſband knows ſhe is living; and yet the Second Marriage is void, and the Huſband may be puniſhed in the Eccleſiaſtical Courts, but not in the Temporal.

Suppoſe a Gentleman from *Ireland*, for Inſtance, ſhould be civil enough to leave his Wife, and reſides Seven Years in *England*; though he hears from her by every Packet, though he writes to her by every Packet, he may marry a Woman in *England* without offending againſt the Act of Parliament. It would be the ſame, if a Perſon living at *Dover* could prevail on his Wife to go and reſide at *Calais* for Seven Years, he might marry another Woman at *Dover* without any Peril from this Law, though every Veſſel brought him Accounts of her good Health. Is this then that great Public Duty, which the State ſo rigorouſly exacts, that none of its Subjects ſhall marry a Second Huſband or Wife, living the Firſt?

It is well known, that a Divorce for Adultery does not diſſolve the Bonds of Matrimony; the Relation of Huſband and Wife ſtill exiſts, and neither Party can marry again; and yet the Day after that Divorce is pronounced, ſhe can marry any Man ſhe pleaſes without offending againſt this Law. It is not then in this Act of Parliament we are to find the Publick Duties which the State exacts from a Huſband and Wife; for in many Caſes a Second Marriage is not puniſhed, or even condemned by it.

Poſſibly the Gentleman may urge, that a Wife's reſiding Abroad for Seven Years may be by Colluſion to give the Huſband an Opportunity of marrying again without committing Felony: In ſhort, if your Lordſhips yield to this Objection of Colluſion, it is impoſſible to foreſee to what extravagant Lengths you may be carried in Support of the Propoſition, that the noble Lady at the Bar is to all Civil Purpoſes ſingle, but to all Criminal Purpoſes a Wife. The Caſe of a Perſon who committed a fraudulent Act of Bankruptcy, on which a Commiſſion iſſued, and for a Concealment of Part of his Effects he was tried and executed, has been mentioned: The Caſe, ſo far from maintaining the Propoſition, is an Authority againſt it: The colluſive Act of Bankruptcy was deemed equivalent to a real one; it bound the Bankrupt to all Civil and Criminal Purpoſes; it ſubjected his Property to be ſeized for the Benefit of his Creditors; it ſubjected his Perſon to the Puniſhment ordained by the Bankrupt Laws; there is no Diſtinction made between Civil and Criminal Purpoſes.

Suppoſe a Commiſſion of Bankruptcy iſſuing fairly upon a Real Act of Bankruptcy, and a Concealment by the Bankrupt; and let me ſuppoſe farther, which is not an impoſſible Thing, that the Commiſſion by Colluſion between the Aſſignees and the Bankrupt is ſuperſeded, as having improperly iſſued, by an Order of my Lord Chancellor, and an Indictment ſhould be afterwards preferred for the Concealment, would any Judge ſuffer a Man to be tried as a Felon under theſe Circumſtances on a Suggeſtion of Fraud in ſuperſeding the Commiſſion? Certainly not: I am perſuaded every Judge, who now aſſiſts your Lordſhips, would tell the Proſecutor he had miſtaken the Place to examine the Fraud; that he ought to have applied to the Court of Chancery, which has excluſive Juriſdiction in Bankruptcy; and direct the Priſoner to be acquitted.

Fermor's Caſe, in Lord *Coke*'s Reports, was cited to your Lordſhips to prove, that Acts Temporal and Eccleſiaſtical may be avoided for Colluſion: Does that learned Judge ſay, where ſuch Acts are to be avoided? No; but, my Lords, to illuſtrate that Paſſage he refers to a Caſe reported in Lord Chief Juſtice *Dyer*'s Reports; and there it appears, that the Act of the Eccleſiaſtical Court, which was granting an Adminiſtration, had been repealed in the Eccleſiaſtical Court for Colluſion. If I wanted Authorities to add to thoſe I have cited, I would borrow this to put into the Number; becauſe it is a direct Proof, that the Eccleſiaſtical Court have a Power to ſet aſide their own Acts for Fraud.

A Caſe of *Lloyd* and *Maddoxs* was cited from *Moore*'s Reports to prove, that the Eccleſiaſtical Courts had a Power to examine into the colluſive Means of obtaining a Judgment in the Temporal Courts; and ſhall not, ſay the Gentlemen, the Temporal Courts take the ſame Liberty with the Sentences of the Eccleſiaſtical? The Caſe need only to be ſtated to ſhew the Fallacy of the Argument. A Perſon claiming a Legacy ſues in the Eccleſiaſtical Court, the proper Forum for the Recovery of that Demand: The Defendant in Anſwer ſays, I have nothing to pay you with; ſuch a one, a Daughter of the Teſtator, has ſued me in a Court of Law for a Debt; has recovered a Judgment againſt me; I muſt pay that Debt; I cannot pay your Legacy, unleſs I pay it out of my own Pocket, and nothing can be more unjuſt. The Executor is to adminiſter the Effects as far as they go, but not to pay the Debts out of his own Pocket. The Legatee in Anſwer ſaid, the Judgment was by Fraud, and the Temporal Court would not prohibit the Eccleſiaſtical from examining into the Matter. This is not only within the Principle of the Common Law, the Legatee having an Intereſt at the Time of the Fraud committed, but falls within the Statute of Queen *Elizabeth*, which ordains, that every Judgment in any Temporal Court by Colluſion is utterly null and void, as if it had never exiſted; it is void againſt every Perſon having an Intereſt; it is void by force of the Statute againſt the Crown demanding a Forfeiture.

A learned Friend of mine, who ſpoke in the Cauſe, and who did me the ſingular Honor of attending to me, not for what I ſaid, but for what I omitted, obſerved to your Lordſhips, that I had avoided entering into the Effect of Fraud and Colluſion upon the Stenence, unleſs by citing the Caſe of *Hatfield* and *Hatfield*. I knew it would fall to my Share to trouble your Lordſhips upon that Subject; and to avoid a Repetition, I contented myſelf in that Stage of the Buſineſs with relying upon the Caſe of *Hatfield* and *Hatfield*, which appeared to me alone ſufficient to anſwer every Argument upon Colluſion.

It is pretty ſingular, that as *Hatfield* and *Hatfield* was a Caſe in Equity, and Two of the moſt eminent Equity Counſel in this Kingdom appear for the Proſecution, that neither of them thought fit to grapple with that Caſe; they found in the Principles of the Court of Equity, that it was not to be anſwered, and therefore prudently paſſed it over to thoſe who ſhould think fit to engage with it. A Woman claimed Forty Pounds a Year, which was veſted in a Truſtee for her Uſe; but there was another Deviſe of an Annuity of Ten Pounds a Year out of Lands, and a Legacy directly given her. The former Huſband releaſed to the Heir at Law of the Second Huſband, who had made theſe Proviſions for his ſuppoſed Wife; ſhe files her Bill; the Firſt Huſband in his Anſwer ſtates all the Circumſtances of their Marriage, the Time, the Place, the Miniſter, and the Perſons preſent, to avoid the Effect of the Releaſe. A Suit of Jactitation is inſtituted in the Eccleſiaſtical Court by Colluſion with the Second Huſband, after Proof of the Marriage in the Cauſe in the Exchequer, and ſhe is declared a ſeparate Woman, and the Widow of the Deceaſed; the Court of Exchequer received the Sentence as concluſive Evidence: On an Appeal to the Houſe of Lords the Decree is affirmed.

If it had ſtood merely upon the printed Caſes in the Houſe of Lords, I ſhould conceive your Lordſhips could not have entertained a Doubt; but the Caſe is mentioned in Sir *John Strange*'s Reports, when he was not a young Man; and the Ground of the Determination is ſtated to be, that the Sentence was concluſive. The Caſe is mentioned alſo by Mr. *Viner* in his Abridgment; where he adds, that the Houſe of Lords held, that a Sentence in the Eccleſiaſtical Court could not be impeached, though the Proceedings were faint and by Colluſion. This clear and direct Authority is to be got rid of, and avoided in this Manner: Mr. *Viner* is a nonſenſical Writer; you are not to give Credit to what he ſays. I ſhould have hoped that Gratitude to Mr. *Viner*'s Memory would have repreſſed that Obſervation: He has ſhortened the Hours of the Labour of Lawyers, and more particularly of thoſe who are in great Buſineſs. But to Caſes in themſelves irrefragable, with Deciſions upon the very Point, Anſwers cannot be given by Argument; unleſs your Lordſhips will dignify thoſe Obſervations with the Name of Argument.

The Caſe of Lady *Mayo* was cited from Doctor's Commons, which is very material to the Cauſe now before your Lordſhips. It was a Caſe of Fraud and Colluſion, diſcovered in the Prerogative Court upon the Appeal, which had been practiſed in the Conſiſtory Court of the Biſhop of *London*: The Fraud was apparent; he that ran might read it: But what ſaid the Judge of the Prerogative Court? You muſt go into the Conſiſtory Court, where the Fraud was committed; I can give you no Relief. There the Colluſion muſt be gone into, there Redreſs may be had, there the Honour of the Court will be vindicated. This is the Opinion of a living Judge of high Character for his Abilities and Integrity; a greater Man perhaps never ſat at the Head of that Court.

Your Lordſhips have been preſſed to give a more favourable Attention to the Wiſhes of the Proſecutor, as the preſent is a Criminal Proceeding. Is it the Principle or Genius of this Country to be more active to find out and puniſh Crimes, than to give Effect to Civil Rights?

My Lords, There is a Benignity in the Laws of this Country to the Frailties of Mankind; the Judges are attentive and zealous, that the Civil Juſtice of the Country be ſtrictly adminiſtered, and will not ſuffer any Contrivance, Chicane, Accident, or Neglect to defeat it; but in Criminal Proſecutions they are humane, they make great Allowances, and are not over anxious to diſcover Criminals. This Obſervation is verified by daily Practice. In a Civil Cauſe, if the Trial comes on before the Plaintiff expects it, if a Witneſs be out of the Way, if the Verdict be in Favour of a Defendant contrary to the Evidence, the Verdict is ſet aſide, and a new Trial ordered and Juſtice done: But in a Criminal Proſecution, if the Verdict be in Favour of the Defendant, though it ariſes from the Abſence of a Witneſs, or from any other Accident, or it be given contrary to the cleareſt and moſt ſatisfactory Proof of Guilt, though not One of the Jury can ſhew his Face without a Bluſh, yet the Verdict ſtands, and a new Trial is never granted; it was even denied in Perjury committed in the Time of King *William*, where the Defendants had the Wickedneſs to corrupt the Witneſſes for the Proſecution to keep out of the Way; for whenever, and by whatever Means, there is an Acquittal in a Criminal Proſecution, the Scene is cloſed and the Curtain drops.

I cannot, my Lords, ſit down without reminding your Lordſhips, that in the Courſe of the Argument have been cited many Determinations in the Temporal Courts by Judges who had no Partiality to the Eccleſiaſtical Juriſdiction, acknowledging their Authority, and declaring *unâ Voce*, that in all Caſes, where they have an excluſive Juriſdiction, the Sentence is final and concluſive: There is not an Exception to be found in the Books. Some of theſe

Declarations were made, when the Judges of the Temporal Courts were exceedingly jealous of the Eccleſiaſtical, and when they were even in a State of Warfare.

Does the preſent Caſe call upon your Lordſhips to break down the Boundaries, which the Conſtitution has fixed between the Temporal and Eccleſiaſtical Courts, or to invade thoſe Rules of Deciſion which have been tranſmitted from the earlieſt of Times? Is there an Authority to warrant your Lordſhips in taking ſo extraordinary a Step?

Is it expected, that your Lordſhips are to be more jealous in finding out Crimes and puniſhing Offenders than your Anceſtors? and to accompliſh thoſe Purpoſes, that you will diſregard the Authorities of the Law, the Practice of Ages, and the Spirit of the *Engliſh* Conſtitution?

If the Matter, inſtead of being clear in Favour of the noble Lady at the Bar, as I conceive it to be, had been only doubtful, I am perſuaded your Lordſhips would pronounce an Acquittal.

It is the Duty and Practice of every Judge in a Criminal Proſecution to let the Jury know, that if there hangs a Doubt in the Cauſe, they ought to give the Turn of the Scale in Favour of Innocence, and acquit the Priſoner.

Can your Lordſhips after an Argument of Three Days, in which ſo many reſpectable Determinations in Favour of the Eccleſiaſtical Juriſdiction have been cited, lay your Hands upon your Breaſts and ſay, here is no Doubt; the Sentence of the Eccleſiaſtical Court, upon the Faith of which and by the Advice of a Perſon of the Firſt Knowledge and Abilities in the Eccleſiaſtical Law the noble Lady acted, is a Nullity and of no Avail; and that ſhe has intentionally violated the Laws of her Country and become a Felon?

My Lords, I will not permit myſelf to ſuſpect any One of your Lordſhips can entertain ſuch an Opinion; and I ſit down with the moſt perfect Confidence, that by your Lordſhips Judgment the noble Lady at the Bar will be diſmiſſed from any farther Attendance upon your Lordſhips.

Lord High Steward. A noble Lord aſks, Whether in that Caſe you cited, where an Action was brought againſt Mr. *Thomas Hervey*, the Court upon hearing the Sentence in the Eccleſiaſtical Court refuſed to proceed farther in it; or whether it was, that the Cauſe was then depending in the Eccleſiaſtical Court?

Mr. Wallace, I will give your Lordſhips an Account from my Memory, confirmed by a Note taken in a ſubſequent Cauſe; and if there is any Doubt upon the Facts, I am happy to acquaint your Lordſhips, that you will have much better Information upon the Subject from the noble Judge who tried the Cauſe. Mr. *Hervey* and the Lady had lived ſeparate ſeveral Years, during which Time a Creditor, who had furniſhed her with Neceſſaries, brought an Action againſt Mr. *Hervey*; he denied his Marriage; there had not been a Sentence at that Time in the Eccleſiaſtical Court; the Jury were ſatisfied with the Evidence of the Marriage, and found a Verdict againſt Mr. *Hervey*.——Another Creditor, who had furniſhed Neceſſaries for the Lady afterwards, brought his Action againſt Mr. *Hervey*, and was provided with the ſame Evidence which had ſatisfied the former Jury; but between the Time of the former Trial and the Trial of this Cauſe a Suit of Jactitation had been inſtituted in the Eccleſiaſtical Court by Mr. *Hervey* againſt the Lady, and a Sentence pronounced in his Favour, which was offered in Evidence: The learned Judge conceived himſelf bound by that Sentence, as the Judgment of a Court of competent Juriſdiction: There was no Impoſition upon the Creditor, no Occaſion for an Alarm by the Deciſion, the Debt was not contracted during Cohabitation, no Act of Mr. *Hervey*'s had induced the Creditor to furniſh the Neceſſaries to her as his Wife, he renounced the Relation; the Plaintiff gave Credit upon the Marriage itſelf, and therefore took upon him to ſatisfy the Court that there was a legal Marriage: The Sentence of the Eccleſiaſtical Court had determined the Point; the Judge apprehended that the Queſtion was cloſed, and that he was bound to give Faith and Credit to the Sentence; and the Plaintiff failed on Account of the Sentence, though it was afterwards reverſed upon an Appeal.

Doctor Calvert.

My Lords, The Queſtion ariſing upon the Sentence which has taken up ſo much of your Lordſhips Time, ſeems now confined to a narrower Compaſs than we at firſt apprehended.

My Lords, When the Counſel for the noble Ducheſs at your Lordſhips Bar offered the Sentence in the Eccleſiaſtical Court to be read as concluſive Evidence, it was deſired by the

the Counſel on the other Side, that the Reſt of the Proceedings in that Cauſe might likewiſe be read. This raiſed a Belief in us, that Exception would be taken to the Nature of this Sentence in particular, as differing from Sentences in other Matrimonial Cauſes.

My Lords, We apprehended it would be ſaid, as indeed it was by ſome of the Counſel on the other Side, that a Proceeding in a Cauſe of Jactitation, when the Iſſue of it was, pronouncing for the Jactitation, and the Defendant enjoined Silence (let the Proceeding in that Cauſe have been what it might) would not amount to a poſitive Decree againſt a Marriage, but it would be merely a Diſmiſſion of the Party; that it would amount to no more than this, that nothing had been proved for the preſent, and that the Judgment never would become decretal.

My Lords, I take it to be a mere Miſtake, to ſpeak of Proceedings in ſuch a Cauſe in that Way; but however, we have it now, as I underſtand, in Conceſſion from the Counſel on the other Side, and we are perfectly agreed about the Nature of the Sentence: It has been allowed, it is as complete a Sentence againſt a Marriage, as if it had been pronounced in a Cauſe of Nullity of Marriage.

My Lords, A Conceſſion of this Sort coming from the Counſel on the other Side, your Lordſhips will ſee, muſt leave them much embarraſſed; firſt, by their own Conceſſions of the Effects ſimilar Judgments have had in other Queſtions; and likewiſe by the Act of Parliament, upon which alone this Proſecution can be founded.

My Lords, It is conceded, that ſome Judgments of the Eccleſiaſtical Courts are final as to Matrimony; but if they concede that ſome are, there is now remaining no Objection to this in particular. Your Lordſhips will ſee how much this is ſupported by the Statute, on which the Proſecution is founded; becauſe the Exceptions out of that Statute go directly to thoſe Sentences, with which it is now allowed this is upon a Footing. Can it therefore with any Propriety be now urged, that it ought not to be received as concluſive, becauſe there is a Poſſibility of ſetting it aſide? This ſeemed aſtoniſhing to the learned Gentleman, who who ſpoke firſt on the other Side; that, as it is allowed that the Court who paſſed that Sentence could at any Time upon proper Evidence reverſe it, it ſhould be urged in this Judicature as concluſive upon your Lordſhips. Many Inſtances have been given, where Sentences not more final or irrevocable than this have been allowed in the Common Law Courts. If in a Cauſe of Nullity a Marriage be pronounced to be void, it would not be contended a Moment, but that ſuch a Sentence is within the Exception of the Act; and no Perſon marrying again after ſuch a Sentence could be an Object of Puniſhment under that Act. It is ſurely therefore a very conſiderable Conceſſion, and ſufficient to juſtify the Reliance we have upon it, that it is a poſitive and direct Sentence againſt the Marriage.

My Lords, The Ground of ſome of the Exceptions out of the Act of Parliament ſeems to be the Notoriety of the State of the Party, which leaves no Room for Impoſition on the Perſon with whom the Second Marriage is contracted; for the Act has not in View merely the Puniſhment of the Offence as againſt Morality, becauſe the Exceptions are ſuch which allow in many Caſes a Second Marriage, though the Firſt is really in force. The Object therefore of the Act of Parliament ſeems to be this, that there ſhould be no Deceit put upon the Perſon; it is expreſſed by the Preamble in theſe Words: "Whereas many "Perſons going from one County to another, or into Places where they are not known, "marry again; therefore be it enacted:" But when there has been any Proceeding of this Sort, when there has been any Queſtion litigated in the Eccleſiaſtical Court relative to that Marriage, and when the Sentence of the Court is againſt that Marriage, I believe it is no Strain of the Interpretation of that Act, to ſuppoſe it is one of thoſe Caſes, in which no Proſecution of this Sort ought to be carried on.

My Lords, The Variety of Inſtances that have been produced to ſhew, that whenever any Sentence of this Sort has been produced, it has been conſtantly attended to by all Civil Juriſdictions, will not bear a Contradiction; nothing can be more clear. To all the Caſes that have been quoted on our Side, I do not apprehend that any Anſwer has been given to affect their Authority; what is more, there has been no Caſe cited on the other Side: Therefore, if a Series of Authorities will eſtabliſh any Point, it is to be conceded, that in all Civil Caſes a Sentence thus pronounced by a Court having a competent Juriſdiction, where the Queſtion has come before that Court, Marriage or not Marriage, will be received: the Queſtion then will come to this; If it can be eſtabliſhed, that in Civil Suits it would be received, ought it not to have the ſame Effect in a Criminal Proſecution?

My Lords, For that Purpoſe there have been Caſes cited to your Lordſhips; that of *the King* againſt *Vincent*, where there was a Proſecution for a Forgery, and the Probate was received as concluſive Evidence againſt that Forgery.

My Lords, In anſwer to that it was urged only, that it was a Caſe that was too ſtrong, and they could not give Credit to the Reporter. That Anſwer ſeems by no Means ſatisfactory, eſpecially as it does not meet with Support from any ſubſequent Authority, ſince none has been quoted that comes up to the Point. Two or Three Caſes have been mentioned; but when they are conſidered, and the Circumſtances they were attended with, your Lordſhips will find, it does not appear that they come up to the Caſe in Queſtion. In Two of theſe Inſtances the ſuppoſed Teſtators were living. My Lords, It was a groſs Impoſition, and the whole Proceeding a mere Miſtake, and nothing more. The Teſtator came into Court to give Evidence: To be ſure a Probate under theſe Circumſtances could not be attended to; it could not be a Probate at all; nor could it be contended, that the Probate of the Will of a living Perſon could be received in Evidence. I know the Treatment it received in the Court of Prerogative in that Caſe, where *Stirling* was executed for a Forgery. I enquired, to ſee how that ſtands, and I do not find there were any Proceedings to reverſe or revoke the Probate; the Thing was too abſurd to require a judicial Diſquiſition. I was informed, a Pen was drawn through the Probate, and on the Margin was written the Word *void*. There were Two other Caſes mentioned of Indictments for forging Wills, where it was ſaid, that there was a Probate exiſting; but it does not appear throughout theſe Caſes, that any Mention was made of the Probate at the Trial, or that the Exception was taken for the Priſoners. We pointed out to your Lordſhips the great Inconvenience that would ariſe from going on to enquire into Queſtions of this Sort in Two different Judicatures. It was aſſerted——

A Lord. Whether the Scratch with a Pen through the Probate in the Caſe of *Stirling* was done by any Order of the Court?

Doctor Calvert. Not by any judicial Order, I believe. I apprehend it never came judicially before the Court: By whom it was done I know not. I am not acquainted with that.

My Lords, It was aſſerted by the Counſel on the other Side, that no Deciſion of a Civil Nature could be applied to any Criminal Queſtion: It was aſſerted, but I did not find that it was ſupported by any Principles or Authorities.

My Lords, We, on the other Hand, did ſubmit to your Lordſhips, that the Inconveniencies ariſing from ſuch different Enquiries might be extremely great; for if they produce different Judgments upon the ſame Point, the Perſons, who ſhould be affected and intereſted under them, under ſuch a Predicament might find it difficult to know what ſhould be their Duty. We pointed out, that in caſe the Sentence now in Queſtion remains in Force, which I truſt it will, notwithſtanding any Judgment that may be paſſed in this Court; yet if you ſhould proceed to cenſure the Perſon thus ſeparated from the ſuppoſed former Huſband, from this Contrariety of Judgments the greateſt Confuſion would ariſe; for you would cenſure the Perſon for marrying again, as being the Wife of that Huſband, of whom it had been directly in Iſſue and determined that ſhe was never the Wife. This, my Lords, appears to us a very conſiderable Abſurdity. The only Anſwer I heard to that was rather avowing the Inconvenience than removing it. When it was aſked, In what Predicament would a Woman ſtand under theſe Circumſtances? it was ſaid, ſhe would be a Wife to Criminal Purpoſes, but not ſo as to Civil Conſiderations. What the Diſtinction meant I confeſs I do not well underſtand; but it was ſaid, the noble Lady at the Bar ſhould be conſidered as a Wife to all Criminal Purpoſes, becauſe Perſons cannot abſolve themſelves from their public Duties. I never underſtood, that with regard to Matrimony any Party could abſolve himſelf from his private Duties neither: I always underſtood it, as far as his own Act could affect it, to be an indelible Obligation. But what are the Duties to the Publick, which a Perſon in this Situation ſhould be anſwerable for? A Woman by Law ſeparated from, and even pronounced not to be the Wife of, the ſuppoſed Huſband, and to whom ſhe cannot return; I do not know what Duties there are, that ſhe ſhould be anſwerable to the Publick for: It is contended, that of not marrying again; but this is expreſsly contrary to the Meaning of the Act itſelf, which provides that in many Caſes, even where the former Marriage remains in Force, yet a Second Marriage ſhall not be Criminal; as in the Caſe of a Separation *a Menſa et Thoro* there is no Doubt, that the Parties remain Man and Wife as much as if they had never been divorced; nay, it is ſo merely a temporary Separation, that there is no Occaſion for a judicial Proceeding to bring them together again; for whenever the Parties chuſe to cohabit, they may live together, and are as completely Man and Wife, as if no Separation had happened. It has been obſerved, that ſome Inconveniencies, which were removed by the late Marriage Act, might be introduced again under theſe Suits of Jactitation: It is certainly ſomewhat unintelligible how theſe Suits could be applied to thoſe Purpoſes. The Grievance mentioned

is this, that ſingle Women contracting Debts did, before that Act of Parliament, procure themſelves to be clandeſtinely married to Perſons with whom they never intended to cohabit, but merely with a View fraudulently to protect themſelves againſt their Creditors. Now, can it be argued, that by going into the Eccleſiaſtical Court, and obtaining a Sentence in a Cauſe of Jactitation, that End would be anſwered? What! when a Woman wants a Huſband to protect her from her Debts, ſhall ſhe get herſelf fraudulently releaſed from her Huſband? It ſeems it would have quite a contrary Effect, and cannot anſwer the Purpoſe for which it would be intended. If any of the excellent Regulations made by that Act are in Danger of being infringed upon by undue Practices, it were worthy the Legiſlature to attend to it, and provide againſt them; but a Court of Juſtice cannot for ſuch Reaſons depart from ancient and eſtabliſhed Modes of Proceedings: And in this Caſe theſe Conſiderations ought not to have the leaſt Weight, becauſe there is not any Ground for the Apprehenſion. In the Proceedings in this Criminal Court therefore your Lordſhips ought to receive theſe Sentences upon the very ſame Principles, or indeed broader, than a Civil Court; for who ſhall pretend to ſay, that in a Civil Queſtion Parties may avail themſelves of ſuch a Suit? But where a Perſon is brought merely to anſwer for a Crime, and for the Purpoſe of Puniſhment, who ſhall ſay, that it is conſonant to the Principles of Law that ſuch a Defence ſhould not avail? So rigorous a Determination in Criminal Caſes has not been ſupported on any Authority, or eſtabliſhed on any Principle. Upon the Authorities therefore which have been quoted, and which remain unſhaken and uncontradicted, we do ſubmit to your Lordſhips, that theſe Two Points are well eſtabliſhed. But it has been ſaid, that we are now arguing for what is not open to be conſidered on the general Principles of Law; becauſe this Queſtion has been already decided by the very Act upon which the Proſecution is now depending; for when an Act of Parliament makes ſome Exceptions, the true Interpretation of that Act is, that all Caſes, which are not within the Exceptions, are within the Prohibition.

My Lords, Suppoſing that to be a good Principle of Interpretation, yet it may very well and with Propriety be contended, that the Caſe that is now offered, I mean the Sentence pronouncing againſt this Marriage in a Cauſe of Jactitation, is within the Exceptions of the Act of Parliament.

My Lords, The Two Exceptions are, that it ſhall not extend to any Perſon, who is at the Time of ſuch Marriage divorced by any Sentence had in the Eccleſiaſtical Court; or to any Perſon, where the former Marriage hath been, or hereafter ſhall be, by Sentence in any Eccleſiaſtical Court, decreed to be void and of no Effect.

My Lords, It will be difficult to explain the latter Words, connected with the Proviſion in the former Clauſe, without taking in the very Sentence which is now under Conſideration. The general Words in the Firſt Clauſe are, that it ſhall not extend to thoſe Caſes, in which at the Time of ſuch Marriage the Perſon was divorced by any Sentence of the Eccleſiaſtical Court.

Now, my Lords, the Word Divorce has always been applied, not only to Separations *a Menſa et Thoro*, but to Divorces *a Vinculo Matrimonii*; the Firſt Clauſe therefore, under the general Word of Divorce, ſeems to take in both theſe Caſes, whether it be a temporary Separation for Adultery or Cruelty, or whether it be a Divorce *a Vinculo Matrimonii*. If that Clauſe applies to theſe Two Caſes, I would aſk, what is the Meaning of the Second, that ſpeaks of Sentences declaring a Marriage null and void to all Effects? A Sentence pronouncing a Marriage null, and void, and of no Effect, is the ſame Thing as a Divorce *a Vinculo Matrimonii*; becauſe if the Marriage has ever been a true and legal Marriage, it is well known, that no judicial Power in this Kingdom can put an End to it. In order therefore to give every Part of this Act ſome Meaning, it ought to be underſtood, that the Legiſlature by thoſe general Words muſt mean any Sentence whatever, by which the Eccleſiaſtical Court ſhould have pronounced, that there is no Marriage, or that a Marriage is void; it being the Purport and the general Object of this Act to ſave not only the Juriſdiction of the Eccleſiaſtical Court (that is not what I am contending for); but it is to ſave the Innocence of the Perſons acting under ſuch Sentences: Becauſe where that Queſtion has been agitated in a publick Court (for the Legiſlature does not ſuppoſe, as ſome of the Counſel on the other Side have unwarrantably ſuppoſed, it to be a private and clandeſtine Tranſaction; but) the Conſtitution ſuppoſes every Court to be open and publick, and Proceedings there to be before the Face of the World; every Body may ſee and know them, if they pleaſe; and when there has been this publick Sentence of any conſtitutional Court, the Meaning, the Equity of the Act muſt be, that any One of theſe Sentences ſhall juſtify the Party acting under it. To make a Diſtinction between a Cauſe of Nullity and a Cauſe of Jactitation, I apprehend can be founded upon nothing, but not conſidering the Nature of the Proceedings;

 becauſe

becauſe I can hardly put a Caſe, which would be a proper Subject for a Suit of Nullity, but it might likewiſe be proceeded to the ſame Effect in a Suit of Jactitation; the only Difference is, the Proof being put upon the different Party. Suppoſe a Perſon means to diſpute the Validity of his Marriage; he may, if he pleaſes, proceed in a Cauſe of Nullity of Marriage; in which Caſe he muſt ſtate the Circumſtances of his Marriage, and the Prayer of his Libel will be, that under theſe Circumſtances his Marriage may be pronounced void; the Sentence then would be direct to that Point. Suppoſe, on the other Hand, he chuſes to bring a Suit of Jactitation, and charges that the Woman has claimed him to be her Huſband: If ſhe juſtifies that Jactitation by pleading her Marriage, it is incumbent on her then to ſtate the Caſe, and to go into the Queſtion, whether it is a Marriage or no; and if in that juſtificatory Plea ſuch Circumſtances be ſtated, as would have been the Contents of the Libel in a Cauſe of Nullity, the Sentence, I contend, would have preciſely the ſame Effect.

My Lords, I have known more Inſtances than One to juſtify what I aſſert. The Firſt Suit that ever was brought upon the Marriage Act to avoid a Marriage by reaſon of Minority, where the Party under Age was married by Licence without the Conſent of Parents, was by a Suit of Jactitation: It was the Caſe of *Froſt* and *Waldeck* in 1760. I looked into the Sentence that was pronounced in that Cauſe, and it was preciſely in the ſame Words as this now in Queſtion. Will any Body contend that it is not an effectual Sentence, declaring the Marriage between theſe Parties void? Your Lordſhips ſee it is a Fallacy therefore to ſay, that this Method of Proceeding in a Cauſe of Jactitation will not as effectually bring on the Queſtion of Marriage, as a Cauſe of Nullity of Marriage. There were Two other Caſes afterwards upon that Act, that were brought in the ſame Way; neither of them came to a Deciſion, but the Method of Proceeding was the ſame. Afterwards there was a Suit upon that Act of Parliament brought as a Cauſe of Nullity of Marriage. I remember it being made a Queſtion, whether even that was a proper Way of Proceeding; but the Judge was of Opinion, that the Party might have proceeded in either Way, conceiving, I preſume, that the Sentence in one Way would be as effectual as in the other. With what Propriety then can it be ſaid, as it was on the other Side, that all Proceedings in Cauſes for Jactitation of Marriage muſt be with an ill Intent?

My Lords, It doth not apply at all to the Manner of Proceedings. Suppoſe it to be true, what was aſſerted by the Counſel, and I believe it is in a great Meaſure ſo, that theſe Suits were chiefly uſed for the Purpoſe of enquiring into Contracts of Marriage; for before the Marriage Act put an End to ſuch Contracts, it was difficult for Parties to know, whether they had entered into ſuch Contracts as would bind them or no. With what Propriety can it be ſaid, that if a Suit of Jactitation be brought upon ſuch Contract, it muſt be with an ill Intent? I have mentioned, that theſe Suits have been brought under the Marriage Act, and therefore merely upon the Queſtion of Marriage: In thoſe Caſes the Sentences are preciſely conceived in the ſame Words with the Sentence in this Cauſe: And if a Man was to be married again after ſuch a Sentence pronounced, would it be argued one Moment, that he would be guilty of Polygamy under this Statute? If he would not, it muſt be, becauſe ſuch a Sentence is on the ſame Footing, as if it had been given in a Cauſe of Nullity. For, if a Sentence given in a Cauſe of Nullity was to be offered as concluſive, and before you entered into Evidence upon the Fact, your Lordſhips would think it the proper Time to offer it, there would be no Occaſion to go into the Queſtion; becauſe, let the Fact turn out what it might, that Sentence would be ſatisfactory, that the Marriage was void, that is, that there was no Marriage then ſubſiſting between the Parties. What is the Aſſertion often then in a Suit of Jactitation; and what was the Aſſertion in the Cauſe now before your Lordſhips? The Plaintiff to juſtify his Claim upon the Lady ſtates, that at a particular Time he was married, ſtates the Circumſtances, ſtates the Perſons preſent; he attempts to prove this Fact: The Judge having conſidered the Proofs, and gone into the Queſtion, determined that there was no Marriage, or in other Words, that the Marriage is of none Effect; that is, that the Marriage that is pleaded there can have no Effect; for he pronounces, that, as far as to him appears, the Party is a Spinſter, and free from all Matrimonial Contracts. If we are right then in bringing this Cauſe within the Exceptions of the Act, every Objection I ſhould conceive, that can be ſtated, is removed under the expreſs Regulation of the Act of Parliament; becauſe the Legiſlature taking this Matter into their Conſideration, well aware, as it muſt be ſuppoſed, of what Inconveniencies might be argued to ariſe, have ſtill enacted, that theſe Sentences exiſting, the Perſon marrying again ſhall not be within the Act of Parliament.

Under

Under theſe Conſiderations, the Reply having been ſo fully and ſo ably gone into by the Gentlemen who went before me, I ſhall take up your Lordſhips Time no longer, than in hoping you will be of Opinion, that this Sentence coming within the Exceptions of the Act, it would be improper to go into any Proof of the Fact: And therefore I hope your Lordſhips will admit of this Plea of the Defendant.

Lord Preſident of the Counſel. My Lords, I move your Lordſhips to adjourn to the Chamber of Parliament.

Lords. Ay, Ay.

Lord High Steward. This Houſe is adjourned to the Chamber of Parliament.

The Lords and others returned to the Chamber of Parliament in the ſame Order they came down. The Ducheſs of *Kingſton* retired from the Bar.

After ſome Time paſſed in the Chamber of Parliament,

(*See the Appendix.*)

The Lords and others came back from thence in the ſame Order; and the Peers being ſeated, and the Lord High Steward in his Chair, the Ducheſs of *Kingſton* was again brought to the Bar.

Lord High Steward. Mr. Attorney General, you may go on to ſtate your Charge.

Mr. Attorney General.

My Lords, It ſeems to be Matter of juſt Surpriſe, that, before the Commencement of the laſt Century, no ſecular Puniſhment had been provided for a Crime of this malignant Complexion and pernicious Example.

Perhaps, the Innocence of ſimpler Ages, or the more prevailing Influence of Religion, or the Severity of Eccleſiaſtical Cenſures, together with thoſe Calamities which naturally and neceſſarily follow the Enormity, might formerly have been found ſufficient to reſtrain it.

From the Moment theſe Cauſes ceaſed to produce that Effect, Imagination can ſcarcely ſtate a Crime, which calls more loudly, and in a greater Variety of Reſpects, for the Interpoſition of Civil Authority; which, beſides the groſs and open Scandal given to Religion, implies more cruel Diſappointment to the juſt and honourable Expectations of the Perſons betrayed by it; which tends more to corrupt the Purity of domeſtick Life, and to looſen thoſe ſacred Connections and cloſe Relations, deſigned by Providence to bind the moral World together; or which may create more civil Diſorder, eſpecially in a Country, where the Title to great Honour and high Office is hereditary.

[*Here followed a great Uproar behind the Bar, and the Serjeant at Arms made the uſual Proclamation.*]

My Lords, The Misfortunes of Individuals, the Corruption of private Life, the Confuſion of domeſtick Relations, the Diſorder of Civil Succeſſion, and the Offence done to Religion, are ſuggeſted, not as Ingredients in the particular Offence now under Trial, but as Miſeries likely to ariſe from the Example of the Crime in general; and are laid before your Lordſhips, only to call your Attention to the Courſe and Order of the Trial, that nothing may fall out, which may give Countenance to ſuch a Crime, and heighten ſuch Dangers to the Publick.

The preſent Caſe, to ſtate it juſtly and fairly, is ſtript of much of this Aggravation. The advanced Age of the Parties, and their previous Habits of Life, would reduce many of theſe general Articles of Miſchief and Criminality to idle Topicks of empty Declamation. No Part of the preſent Complaint turns upon any Ruin, brought on the blameleſs Character of injured Innocence; or upon any Diſappointment incurred to juſt and honourable Pretenſions; or upon any Corruption ſuppoſed to be introduced into domeſtick Life. Nor ſhould I expect much ſerious Attention of your Lordſhips, if I ſhould urge the Danger of intailing an uncertain Condition upon a helpleſs Offſpring, or the Apprehenſion of a diſputed Succeſſion to the Houſe of *Pierrepoint*, as probable Aggravations of this Crime.

But your Lordſhips will be pleaſed withal to remember, that every Plea, which, in a Caſe differently circumſtanced, might have laid Claim to your Pity for an unfortunate Paſſion in younger Minds, is entirely cut off here. If it be true, that the ſacred Rights of Matrimony have been violated, I am afraid it muſt alſo appear, that dry Lucre was the whole Inducement,

ment, cold Fraud the only Means to perpetrate that Crime. In Truth, the Evidence, if it turns out correſpondent to the Expectations I have formed, will clearly and expreſsly repreſent it as a Matter of perfect Indifference to the Priſoner, *which* Huſband ſhe adhered to, ſo that the Profit to be drawn from *this* Marriage, or from *that*, was tolerably equal. The Crime, ſtated under theſe Circumſtances, and carrying this Impreſſion, is an Offence to the Law; which, if it be leſs aggravated in ſome Particulars, becomes only more odious in others.

But I decline making general Obſervations upon the Evidence. I will ſtate it to your Lordſhips (for it lies in a very narrow Compaſs) in the ſimpleſt and ſhorteſt Manner I can invent. The Facts (as the State of the Evidence promiſes me they will be laid before your Lordſhips) form a Caſe, which it will be quite impoſſible to aggravate, and extremely difficult to extenuate.

My Lords, Conſidering the Length of Time which has intervened, a very few Periods will compriſe the Facts, which I am able to lay before your Lordſhips. *Firſt*, The Marriage of the Priſoner with Mr. *Hervey*; her Cohabitation with him at broken and diſtant Intervals; the Birth of a Child in conſequence of it; the Rupture, and Separation which ſoon followed. *Secondly*, The Attempt, which the Priſoner, in View to the late Lord *Briſtol*'s then State of Health, made to eſtabliſh the Proofs of her Marriage with the preſent Earl. *Laſtly*, The Plan, which makes the immediate Subject of the preſent Indictment, for bringing about the Celebration of a Second Marriage with the late Duke of *Kingſton*.

The Priſoner came to *London* early in Life, ſome Time, as I take it, about the Year 1740. About Forty-three, ſhe was introduced into the Family of the late Princeſs of *Wales*, as her Maid of Honour. In the Summer of Forty-four, ſhe contracted an Acquaintance with Mr. *Hervey*; which begins the Matter of the preſent Indictment. This Acquaintance was contracted by the meer Accident of an Interview at *Wincheſter* Races. The Familiarity immediately began; and very ſoon drew to its Concluſion.

Miſs *Chudleigh* was about about Eighteen Years of Age; and reſided at the Houſe of a Mr. *Merrill*, her Couſin, on a Viſit with a Mrs. *Hanmer*, her Aunt, who was alſo the Siſter of Mr. *Merrill*'s Mother. One Mr. *Mountenay*, an intimate Friend of Mr. *Merrill*'s, was there at the ſame Time.

Mr. *Hervey* was a Boy about Seventeen Years old, of ſmall Fortune, but the younger Son of a noble Family. He was Lieutenant of the *Cornwall*, which made Part of Sir *John Daver*'s Squadron, then lying at *Portſmouth*, and deſtined for the *Weſt-Indies*. In ſhort, he appeared to Mrs. *Hanmer* an advantageous Match for her Niece.

From *Wincheſter* Races he was invited to *Lainſton*; and carried the Ladies to ſee his Ship at *Portſmouth*. The *Auguſt* following, he made a Second Viſit at *Lainſton* for Two or Three Days; during which the Marriage was contracted, celebrated, and conſummated.

Some Circumſtances, which I have already alluded to, and others, which it is immaterial to ſtate particularly, rendered it impoſſible, or improvident, in a Degree next to impoſſible, that ſuch a Marriage ſhould be celebrated ſolemnly, or publickly given out to the World. The Fortune of both was inſufficient to maintain them in that Situation, to which his Birth, and her Ambition had Pretenſions. The Income of her Place would have failed. And the Diſpleaſure of the noble Family, to which he belonged, rendered it impoſſible on his Part to avow the Connection. The Conſequence was, that they agreed without Heſitation to keep the Marriage ſecret. It was neceſſary for that Purpoſe to celebrate it with the utmoſt Privacy; and accordingly no other Witneſſes were preſent, but ſuch as had been appriſed of the Connection, and were thought neceſſary to eſtabliſh the Fact, in caſe it ſhould ever be diſputed.

Lainſton is a ſmall Pariſh, the Value of the Living being about Fifteen Pounds a Year; Mr. *Merril*'s the only Houſe in it; and the Pariſh Church at the End of his Garden. On the 4th of *Auguſt* 1744, Mr. *Amis*, the then Rector, was appointed to be at the Church, alone, late at Night. At Eleven o'Clock, Mr. *Hervey* and Miſs *Chudleigh* went out, as if to walk in the Garden; followed by Mrs. *Hanmer*, her Servant (whoſe Maiden Name I forget; ſhe is now called *Ann Cradock*, having married Mr. *Hervey*'s Servant of that Name) Mr. *Merrill*, and Mr. *Mountenay*; which laſt carried a Taper to read the Service by. They found Mr. *Amis* in the Church, according to his Appointment; and there the Service was celebrated, Mr. *Mountenay* holding the Taper in his Hat. The Ceremony being performed, Mrs. *Hanmer*'s Maid was diſpatched to ſee that the Coaſt was clear; and they returned into the Houſe, without being obſerved by any of the Servants. I mention theſe ſmall Circumſtances, becauſe they happen to be recollected by the Witneſs.

The

The Marriage was conſummated the ſame Night; and he lay with her Two or Three Nights following; after which he was obliged to return to his Ship, which had received ſailing Orders.

Miſs *Chudleigh* went back, as had been agreed, to her Station of Maid of Honour in the Family of the Princeſs Dowager. Mr. *Hervey* ſailed in *November* following for the *Weſt-Indies*; and remained there till *Auguſt* 1746, when he ſet Sail for *England*. In the Month of *October* following he landed at *Dover*, and reſorted to his Wife, who then lived, by the Name of Miſs *Chudleigh*, in *Conduit-ſtreet*. She received him as her Huſband, and entertained him accordingly, as far as conſiſted with their Plan of keeping the Marriage ſecret. In the latter End of *November* in the ſame Year, Mr. *Hervey* ſailed for the *Mediterranean*, and returned in the Month of *January* 1747, and ſtaid here till *May* in the ſame Year. Mean while ſhe continued to reſide in *Conduit-ſtreet*, and he to viſit her as uſual, till ſome Differences aroſe between them, which terminated in a downright Quarrel; after which they never ſaw each other more. He continued abroad till *December* 1747, when he returned; but no Intercourſe, which can be traced, paſſed between them afterwards.

This general Account is all I am able to give your Lordſhips of the Intercourſe between Mr. *Hervey* and his Wife. The Cauſe of the Diſpleaſure, which ſeparated them, is immaterial to be enlarged upon. The Fruit of their Intercourſe was a Son, born at *Chelſea*, ſome Time in the Year 1747. The Circumſtances of that Birth, the Notice which People took of it, and the Converſations which ſhe held about that, and the Death of the Child, furniſh Part of the Evidence, that a Matrimonial Connection actually ſubſiſted between them.

After having mentioned ſo often the Secrecy, with which the Marriage and Cohabitation were conducted, it ſeems needleſs to obſerve to your Lordſhips, that the Birth of a Child was ſuppreſſed with equal Care. *That* alſo made but an aukward Part of the Family and Eſtabliſhment of a Maid of Honour.

My Lords, That which I call the Second Period, was in the Year 1759. She had then lived at a Diſtance from her Huſband near Twelve Years. But the infirm State of the late Lord *Briſtol*'s Health ſeemed to open the Proſpect of a rich Succeſſion, and an Earldom. It was thought worth while, as nothing better had then offered, to be Counteſs of *Briſtol*; and for that Purpoſe to adjuſt the Proofs of her Marriage.

Mr. *Amis*, the Miniſter who had married them, was at *Wincheſter*, in a declining State of Health. She appointed her Couſin, Mr. *Merrill*, to meet her there on the 12th of *February* 1759; and by Six in the Morning ſhe arrived at the *Blue Boar* Inn, oppoſite Mr. *Amis*'s Houſe. She ſent for his Wife and communicated her Buſineſs, which was to get a Certificate from Mr. *Amis* of her Marriage with Mr. *Hervey*. Mrs. *Amis* invited her to their Houſe, and acquainted her Huſband with the Occaſion of her coming. He was ill a-bed; and deſired her to come up. But nothing was done in the Buſineſs of the Certificate, till the Arrival of Mr. *Merrill*, who brought a Sheet of ſtamped Paper to write it upon. They were ſtill at a Loſs about the Form, and ſent for one *Spearing* an Attorney. *Spearing* thought, that the merely making a Certificate, and delivering it out in the Manner which had been propoſed, was not the beſt Way of eſtabliſhing the Evidence which might be wanted. He therefore propoſed, that a Check-book (as he called it) ſhould be bought; and the Marriage be regiſtered in the uſual Form, and in the Preſence of the Priſoner. Some Body ſuggeſting that it had been thought improper ſhe ſhould be preſent at the making of the Regiſter, he deſired ſhe might be called; the Purpoſe being perfectly fair, merely to ſtate that in the Form of a Regiſter, which many People knew to be true; and which thoſe Perſons of Honour, then preſent, give no Room to doubt. Accordingly his Advice was taken, the Book was bought, and the Marriage was regiſtered. The Book was intitled, *Marriages, Births, and Burials in the Pariſh of* Lainſton. The Firſt Entry ran, *The Twenty-ſecond of* Auguſt *One thouſand Seven hundred and Forty-two, buried, Mrs.* Suſannah Merrill, *Relict of* John Merrill, *Eſq.* The next was *the Fourth of* Auguſt *One thouſand Seven hundred and Forty-four, married, the Honourable* Auguſtus Hervey, *Eſq; to Miſs* Elizabeth Chudleigh, *Daughter of Colonel* Thomas Chudleigh, *late of* Chelſea College *deceaſed, in the Pariſh Church of* Lainſton, *by me* Thomas Amis. The Priſoner was in great Spirits. She thanked Mr. *Amis*; and told him, it might be a hundred thouſand Pounds in her Way. She told Mrs. *Amis* all her Secrets; of the Child ſhe had by Mr. *Hervey*; a fine Boy, but it was dead; and how ſhe borrowed a hundred Pounds of her Aunt *Hanmer* to make Baby Cloaths. It ſerved the Purpoſe of the Hour to diſcloſe theſe Things. She ſealed up the Regiſter, and left it with Mrs. *Amis*, in Charge, upon her Huſband's Death, to deliver it to Mr. *Merrill*. This happened in a few Weeks after.

Mr. *Kinchin*, the preſent Rector, ſucceeded to the Living of *Lainſton*; but the Book remained in the Poſſeſſion of Mr. *Merrill*.

In the Year 1764 Mrs. *Hanmer* died, and was buried at *Lainſton*. A few Days after, Mr *Merrill* deſired her Burial might be regiſtered. Mr. *Kinchin* did not know of any Regiſter, which belonged to the Pariſh; but Mr. *Merrill* produced the Book, which Mr. *Amis* had made; and taking it out of the ſealed Cover, in which it had remained till that Time, ſhewed *Kinchin* the Entry of the Marriage, and bade him not mention it. *Kinchin* ſubjoined the Third Entry, *Buried*, December *the Tenth*, *One thouſand Seven hundred and Sixty-four*, *Mrs.* Ann Hanmer, *Relict of the late Colonel* William Hanmer; and delivered the Book again to Mr. *Merrill*.

In the Year 1767 Mr. *Merrill* died; Mr. *Bathurſt*, who married his Daughter, found this Book among his Papers; and taking it to be, what it purported, a Pariſh Regiſter, delivered it to Mr. *Kinchin* accordingly. He has kept it as ſuch ever ſince; and upon that Occaſion made the Fourth Entry, *Buried*, *the 7th of* February *One thouſand Seven hundred and Sixty-ſeven*, John Merrill, *Eſq*;

The Earl of *Briſtol* recovered his Health; and this Regiſter was forgotten, till a very different Occaſion aroſe for Enquiry after it.

The Third Period, to which I begged the Attention of your Lordſhips in the Outſet, was in the Year 1768. Nine Years had paſſed, ſince her former Hopes of a great Title and Fortune had fallen to the Ground. She had at length formed a Plan to attain the ſame Object another Way. Mr. *Hervey* alſo had turned his Thoughts to a more agreeable Connection; and actually entered into a Correſpondence with the Priſoner, for the Purpoſe of ſetting aſide a Marriage ſo burdenſome and hateful to both. The Scheme he propoſed was rather indelicate; not that afterwards executed, which could not ſuſtain the Eye of Juſtice a Moment; but a ſimpler Method, founded in the Truth of the Caſe; that of obtaining a Separation by Sentence, *a Menſâ et Thoro propter Adulterium*; which might ſerve as the Foundation of an Act of Parliament for an abſolute Divorce. He ſent her a Meſſage to this Effect, in Terms ſufficiently peremptory and rough, as your Lordſhips will hear from the Witneſs. Mrs. *Cradock*, the Woman I have mentioned before, as being Mrs. *Hanmer*'s Servant and preſent at the Marriage, was then married to a Servant of Mr. *Hervey*, and lived in the Priſoner's Family with her Huſband. He bade her tell her Miſtreſs, *That he wanted a Divorce*; *that he ſhould call upon her* (Cradock) *to prove the Marriage*; *and that the* Priſoner *muſt ſupply ſuch other Evidence as might be neceſſary*.

This might have anſwered his Purpoſe well enough; but her's required more Reſerve and Management; and ſuch a Proceeding might have diſappointed it. She therefore ſpurned at that Part of the Propoſal; and refuſed, in Terms of high Reſentment, *to prove herſelf a Whore*. On the 18th of *Auguſt* following ſhe entered a Caveat at Doctors Commons, to hinder any Proceſs paſſing under Seal of the Court, at the Suit of Mr. *Hervey*, againſt her, in any Matrimonial Cauſe, without Notice to her Proctor.

What Difficulties impeded the direct and obvious Plan, or what Inducements prevailed in Favour of ſo different a Meaſure, I cannot ſtate to your Lordſhips. But it has been already ſeen in a Debate of many Days, what Kind of Plan they ſubſtituted in Place of the former.

In the *Michaelmas* Seſſion of the Year 1768, ſhe inſtituted a Suit of Jactitation of Marriage in the common Form. The Anſwer was a Croſs Libel, claiming the Rights of Marriage. But the Claim was ſo ſhaped, and the Evidence ſo applied, that Succeſs became utterly impracticable.

A groſſer Artifice, I believe, was never fabricated. His Libel ſtated the Marriage, with *many* of its Particulars; but not *too many*. It was large in alleging all the indifferent *Circumſtances* which attended the Courtſhip, Contract, Marriage Ceremony, Conſummation, and Cohabitation; but when it came to the *Facts* themſelves, it ſtated a *ſecret* Courtſhip, and a Contract, *with the Privity of Mrs.* Hanmer *alone*, who was then dead. The Mar iage Ceremony, which, in Truth, was celebrated in the Church at *Lainſton*, was ſaid to have been performed at *Mr.* Merrill's *Houſe*, *in the Pariſh of* Sparſhot, *by Mr.* Amis, in the Preſence of *Mrs.* Hanmer and *Mr.* Mountenay, who were all Three dead. Mrs. *Cradock*, whom but Three Months before he held out as a Witneſs of the Marriage, was dropped; and, to ſhut her out more perfectly, the Conſummation is ſaid to have paſſed *without the Privity or Knowledge of any Part of the Family and Servants of Mr.* Merrill; meaning perhaps that *Cradock* was Servant to Mrs. *Hanmer*. It was further inſinuated, that the Marriage was kept a *Secret*, *except from the Perſons before-mentioned*.

To

To theſe Articles the Form of Proceeding obliged her to put in a perſonal Anſwer upon Oath. She denies the *previous* Contract; ſhe evades the Propoſal of Marriage, by ſtating that it was *made* to Mrs. *Hanmer* without *her Privity*; not denying that it was afterwards *communicated* to her. The reſt of the Article, which contains a circumſtantial Allegation of the Marriage, together with the Time, Place, Witneſſes, and ſo forth, ſhe buries in the formulary Concluſion of every Anſwer, by *denying the Reſt of the ſaid pretended Poſition, or Article to be true in any Part thereof.* Finally, ſhe demurs to the Article, which alleges Conſummation.

Denying the Reſt of the Article to be true in *any Part* of it reſerves this *Salvo*. The whole Averment of Marriage was but *One Part* of the Article; that Averment (the Language is ſo conſtructed) makes but one Member of a Sentence; and yet it combines falſe Circumſtances with true. *They were, in Mr.* Merrill's *Houſe, at* Sparſhot, *joined together in Holy Matrimony.* This *Part* of the Article, as her Anſwer calls it, is not true. It is true they were *married*; but not true, that they were married *at* Sparſhot, or *at Mr.* Merrill's *Houſe.*

How was this groſs and palpable Evaſion treated? It is the Courſe of the Eccleſiaſtical Court to file Exceptions to indiſtinct or inſufficient Anſwers. Otherwiſe, to be ſure, they could not compel a Defendant to put in any material Anſwer. But it was not the Purpoſe of this Suit to exact a ſufficient Anſwer; conſequently no Exceptions were filed; but the Parties went to Iſſue.

The Plan of the Evidence alſo was framed upon the ſame meaſured Line. The Articles had excluded every Part of the Family: Even the Woman, whom Mr. *Hervey* had ſent to demand the Divorce, was omitted. But her Huſband is produced, to ſwear, that in the Year 1744 Mr. *Hervey danced* with Miſs *Chudleigh* at *Wincheſter* Races, and *viſited* her at *Lainſton*; and in 1746 he *heard a Rumour* of their Marriage. *Mary Edwards* and *Ann Hillam*, Servants in Mr. *Merrill*'s Family, did not contradict the Article they were examined to, which alleges, that none of his Servants knew any Thing of the Matter. But they had *heard the Report.* So had Meſſr. *Robinſon, Hoſſack*, and *Edwards.* Such was the Amount of Mr. *Hervey*'s Evidence; in which the Witneſſes make a great Shew of Zeal to diſcloſe all they know, with a proper Degree of Caution to explain that they know nothing.

The *Form* of examining Witneſſes was alſo obſerved on her Part; and ſhe proved, moſt irrefragably, that ſhe paſſed as a ſingle Woman; went by her Maiden Name; was Maid of Honour to the Princeſs Dowager; bought and ſold; borrowed Money of Mr. *Drummond*; and kept Caſh with him, and other Bankers, by the Name of *Elizabeth Chudleigh*; nay, that Mr. *Merrill*, and Mrs. *Hanmer*, who had agreed to keep the Marriage ſecret, converſed, and correſponded with her by that Name.

For this Purpoſe a great Variety of Witneſſes was called; whom it would have been very raſh to produce, without ſome foregone Agreement, or perfect Underſtanding, that they ſhould not be croſs-examined. Many of them could not have kept their Secret under that Diſcuſſion; even in the imperfect and wretched Manner, in which Croſs Examination is managed upon Paper, and in thoſe Courts. Therefore not a ſingle Interrogatory was filed; nor a ſingle Witneſs croſs examined, though produced to Articles exceedingly confidential, ſuch as might naturally have excited the Curioſity of an adverſe Party to have made further Enquiries.

In the Event of this Cauſe, thus treated, thus pleaded, and thus proved, the Parties had the ſingular Fortune to catch a Judgment againſt the Marriage by meer Surpriſe upon the Juſtice of the Court.

While I am obliged to complain of this groſs Surpriſe, and to ſtate the very Proceedings in the Cauſe as pregnant Evidence of their own Colluſion, I would not be underſtood to intend any Reflection on the Integrity or Ability of the learned and reſpectable Judge.

For oft, though Wiſdom wake, Suſpicion Sleeps
At Wiſdom's Gate, and to Simplicity
Reſigns her Charge; while Goodneſs thinks no Ill,
Where no Ill ſeems. ———

Nor ſhould any Imputation of Blame be extended to thoſe Names, which your Lordſhips find ſubſcribed to the Pleadings. The Forms of Pleading are Matters of Courſe. And if they were laid before Counſel, only to be ſigned, without calling their Attention to the Matter of them, the Colluſion would not appear. A Counſel may eaſily be lead to overlook, what nobody has any Intereſt or Wiſh that he ſhould conſider.

Thus

Thus was the Way paved to an adulterous Marriage; thus was the Duke of *Kingſton* drawn in to believe, that Mr. *Hervey*'s Claim to the Priſoner was a falſe and injurious Pretenſion; and he gave his unſuſpecting Hand to a Woman, who was then, and had for Twenty-five Years, been the Wife of another.

In the vain and idle Converſations, which ſhe held, at leaſt with thoſe who knew her Situation, ſhe could not refrain from boaſting how ſhe had ſurpriſed the Duke into that Marriage. *Do not you think* (ſays ſhe with a Smile to Mrs. *Amis*) *do not you think, that it was very kind in his Grace to marry an old Maid?* Mrs. *Amis* was Widow of the Clergyman, who had married her to Mr. *Hervey*, who had aſſiſted her in procuring a Regiſter of that Marriage, and to whom ſhe had told of the Birth of the Child. The Duke's Kindneſs, as ſhe inſultingly called it, was ſcarcely more ſtrange, than her Manner of repreſenting it to one who knew her real Situation ſo well.

My Lords, This is the State of the Evidence; which muſt be given, were it only to ſatisfy the *Form* of the Trial; but is in *Fact* produced, to prove that, which all the World knows perfectly well, as a Matter of publick Notoriety. The Subject has been much talked of; but never, I believe, with any Manner of Doubt, in any Company at all converſant with the Paſſages of that Time in this Town. The Witneſſes, however, will lay theſe Facts before your Lordſhips; after which, I ſuppoſe, there can be no Queſtion what Judgment muſt be pronounced upon them: For your Lordſhips will hardly view this Act of Parliament juſt in the Light in which the Priſoner's Counſel have thought fit to repreſent it, as a Law made for *Beggars*, not for *People of Faſhion*. To be ſure, the Preamble does not expreſsly prove the Legiſlature to have foreſeen or expected, that theſe would be the Crimes of higher Life, or nobler Condition. But the Act is framed to puniſh the Crime, wherever it might occur; and the impartial Temper of your Juſtice, my Lords, will not turn aſide its Courſe in reſpect to a noble Criminal.

Nor does the Guilt of ſo heinous a Fraud ſeem to be extenuated, by referring to the Advice of thoſe by whoſe Aid it was conducted, or to the confident Opinion they entertained of the Succeſs of their Project. I know this Project was not (nor did I ever mean to contend it was) all her own. Particularly, in that fraudulent Attempt upon publick Juſtice, it could not be ſo. But, my Lords, that imparting a Criminal Purpoſe, to the neceſſary Inſtruments for carrying it into Execution, extenuates the Guilt of the Author, is a Conceit perfectly new in Morality, and more than I can yield to. It rather implies Aggravation, and the additional Offence of corrupting theſe Inſtruments. Not that I mean by this Obſervation to palliate the Guilt of ſuch corrupt Inſtruments. I think it may be fit, and exceedingly wholeſome, to convey to Doctors Commons, that thoſe among them, if any ſuch there are, who, being acquainted with the whole Extent of the Priſoner's Purpoſe, to furniſh herſelf with the falſe Appearance of a ſingle Woman in order to draw the Duke into ſuch a Marriage, aſſiſted her in executing any Part of it, are far enough from being clear of the Charge contained in this Indictment. They are Acceſſaries to her Felony; and ought to anſwer for it accordingly. This is ſtating her Caſe fairly. The Crime was committed by her, and her Accomplices. All had their Share in the Perpetration of the Crime: Each is ſtained with the Whole of the Guilt.

My Lords, I proceed to examine the Witneſſes. The Nature of the Caſe ſhuts out all Contradiction or Impeachment of Teſtimony. It will be neceſſary for your Lordſhips to pronounce that Opinion and Judgment, which ſo plain a Caſe will demand.

Mr. Solicitor General.

My Lords, We will now proceed to call our Witneſſes.——Call *Ann Cradock*.

Who came to the Bar, and One of the Clerks held the Book to her, upon which ſhe laid her Hand.

Clerk of the Crown. Hearken to your Oath.

The Evidence that you ſhall give on Behalf of our Sovereign Lord the King's Majeſty, againſt *Elizabeth* Ducheſs Dowager of *Kingſton*, the Priſoner at the Bar, ſhall be the Truth, the whole Truth, and nothing but the Truth,

So help you GOD.

Then ſhe kiſſed the Book.

Mr. Wallace. My Lords, I am deſired by the noble Lady at the Bar to apply to your Lordſhips for an Indulgence, that a Queſtion may be put to the Witneſs by her Counſel.

Lords. Aye, Aye.

Mr. Wallace. I ſhall beg the Witneſs may inform your Lordſhips whether ſhe has not had a Security for ſome Proviſion, or Benefit, or a Promiſe, in conſequence of the Evidence ſhe is to give on this Indictment?

Ann Cradock. No.

Mr. Solicitor General How long have you been acquainted with the Lady at the Bar?

Ann Cradock. Above Thirty-two Years.

Mr. Solicitor General. Where did you firſt become acquainted with her?

Ann Cradock. I ſaw the Lady firſt in *London*, afterwards at *Lainſton.*

Mr. Solicitor General. What Occaſion carried you to the Lady at *Lainſton?*

Ann Cradock. Along with a Lady that I ſerved.

Mr. Solicitor General. Name the Lady.

Ann Cradock. Mrs. *Hanmer.*

Mr. Solicitor General. Was Mrs. *Hanmer* any Relation to the Lady at the Bar?

Ann Cradock. Her own Aunt.

Mr. Solicitor General. Was the Lady at the Bar at *Lainſton* along with Mrs. *Hanmer?*

Ann Cradock. Not when I firſt went down to *Lainſton.*

Mr. Solicitor General. Did ſhe come down there afterwards?

Ann Cradock. Yes.

Mr. Solicitor General. Do you remember ſeeing Mr. *Auguſtus Hervey* there at that Time?

Ann Cradock. I remember ſeeing Mr. *Auguſtus Hervey* there, but not at the Time I firſt ſaw the Lady there.

Mr. Solicitor General. When did Mr. *Hervey* come there?

Ann Cradock. It was in *June*, at the *Wincheſter* Races.

Mr. Solicitor General. How long did he ſtay there at that Time?

Ann Cradock. I cannot particularly ſay how long he might ſtay: He was coming and going.

Mr. Solicitor General. Was you in *Lainſton* Church with Mr. *Hervey* and that Lady, at any Time in that Summer?

Ann Cradock. I was.

Mr. Solicitor General. At what Time of the Day?

Ann Cradock. It was towards Night: It was at Night, not in the Day.

Mr. Solicitor General. Upon what Occaſion?

Ann Cradock. To ſee the Marriage.

Mr. Solicitor General. Name the Perſons who were preſent.

Ann Cradock. Mr. *Merrill*, Mrs. *Hanmer*, Mr. *Mountenay*, Mr. *Hervey*, Miſs *Chudleigh*, and myſelf.

Mr. Solicitor General. Who was the Clergyman?

Ann Cradock. Mr. *Amis*, who belonged to the Church.

Mr. Solicitor General. Were they married there?

Ann Cradock. Yes; I ſaw them married.

Mr. Solicitor General. Was the Marriage kept ſecret?

Ann Cradock. Yes.

Mr. Solicitor General. By what Ceremony was the Marriage?

Ann Cradock. By the Matrimonial Ceremony; by the Common Prayer Book.

Mr. Solicitor General. Was you employed to take Care, that the other Servants ſhould be out of the Way?

Ann Cradock. Yes.

Mr. Solicitor General. Did they return to Mr. *Merrill*'s Houſe after the Marriage?

Ann Cradock. Yes, they did.

Mr. Solicitor General. How far is the Church from the Houſe?

Ann Cradock. Not a great Diſtance, but I cannot ſay how far: It is in the Garden.

Mr. Solicitor General. Did Mr. *Amis* return with the Party into the Houſe?

Ann Cradock. Not that I ſaw.

Mr. Solicitor General. Did you attend on the Lady as her Maid?

Ann Cradock. I did at that Time, her own not being able.

Mr. Solicitor General. After the Ceremony, did you ſee the Parties in Bed together?

Ann Cradock. I did.

A Lord. Repeat what you ſaid.

Ann Cradock. I ſaw them put to Bed; I alſo ſaw Mrs. *Hanmer* inſiſt upon their getting up again.

Mr. Solicitor General. Did you ſee them the next Morning?

Ann Cradock. I ſaw them that Night afterwards in Bed, the ſame Night after Mrs. *Hanmer* went to Bed.

Mr. Solicitor General. Did you ſee them afterwards in Bed for ſome Nights after that?

Ann Cradock. I ſaw them particularly in Bed the laſt Night Mr. *Hervey* was there, for he was to ſet out in the Morning at Five o'Clock; I was to call him at that Hour, which I did; and entering the Chamber, I found them both faſt aſleep; they were very ſorry to take Leave.

Mr. Solicitor General. Can you fix what Year this was?

Ann Cradock. I believe it to be in the Year 1744, but I am certain it was the ſame Year in which the *Victory* was at *Portſmouth.*

Mr. Solicitor General. Do you recollect what Time of the Year it was?

Ann Cradock. In the Month of *Auguſt*, I think.

Mr. Solicitor General. What is your Reaſon for thinking it was in the Month of *Auguſt?*

Ann Cradock. My Reaſon is, that it was in the Time of *Maunhill* Fair; and alſo that there were Green-Gages ripe, which the Lady and Gentleman were both very fond of.

Mr. Solicitor General. Do you recollect how long it was after the Death of Mr. *Merrill*'s Mother?

Ann Cradock. No, I cannot juſtly ſay.

Mr. Solicitor General. Where did Mr. *Hervey* go, as you underſtood, the Morning he went away?

Ann Cradock. To *Portſmouth.*

Mr. Solicitor General. Did you underſtand that he was then in the Sea Service?

Ann Cradock. I did, and that he was going with Admiral *Davers.*

Mr. Solicitor General. Have you any particular Reaſon for knowing that he did go with Admiral *Davers?*

Ann Cradock. The Reaſon I have to believe he did go with him is, the Perſon whom I married afterwards was Mr. *Hervey*'s Servant.

Mr. Solicitor General. Was he Servant to him at that Time?

Ann Cradock. He was.

Mr. Solicitor General. Did you receive any Letter from the Perſon you afterwards married, who was Mr. *Hervey*'s Servant, and attended him?

Ann Cradock. I did, from *Port-Mahon.*

Mr. Solicitor General. Do you know what Relation Mr. *Merrill* was to the Lady at the Bar?

Ann Cradock. Firſt Couſin.

Mr. Solicitor General. Who was Mr. *Mountenay*, whom you mentioned as preſent at the Marriage?

Ann Cradock. A Friend of Mr. *Merrill*'s, as he pretended.

Mr. Solicitor General. Did he live in the Family at that Time?

Ann Cradock. He was in the Family at that Time, and had been from the Time of the Death of his Mother.

Mr. Solicitor General. Do you know whether any other Part of the Family, of both Parties, were acquainted with the Marriage, except thoſe Perſons whom you have mentioned?

Ann Cradock. No, I did not at that Time.

Mr. Solicitor General. Did the Lady change her Name on the Marriage?

Ann Cradock. Never in publick to my Knowledge.

Mr. Solicitor General. Had you Occaſion after this to ſee the Lady in *London?*

Ann Cradock. I ſaw the Lady in *London* many Times.

Mr. Solicitor General. Do you know whether there were any Children of the Marriage?

Ann Cradock. I believe one.

Mr. Solicitor General. What Reaſon have you for believing ſo?

Ann Cradock. The Lady herſelf told me ſo, and her Aunt alſo, whom I ought to have mentioned firſt. The Lady told me, that ſhe would take me to ſee the Child.

Mr. Solicitor General. Did ſhe offer to carry her Aunt as well as you to ſee the Child?

Ann Cradock. I do not know that.

Mr.

Mr. Solicitor General. How long after the Marriage was it, that ſhe told you ſhe would take you to ſee the Child?

Ann Cradock. That I cannot ſay, but it was after Mr. *Hervey* returned a Second Time.

Mr. Solicitor General. Returned, from whence?

Ann Cradock. I heard he had been at *Port-Mahon.*

Mr. Solicitor General. Do you recollect how long Mr. *Hervey* had been abſent the Firſt Time?

Ann Cradock. No, I do not.

Mr. Solicitor General. How long had he been abſent the Second Time?

Ann Cradock. After his Return the Second Time, I believe the Child to have been begotten.

Mr. Solicitor General. How long after Mr. *Hervey*'s Second Return was it, that ſhe told you ſhe would carry you to ſee the Child.

Ann Cradock. It was after his Firſt Return.

A Lord. I believe there is ſome Miſtake. Let the Witneſs explain that.

Mr. Solicitor General. Was it after Mr. *Hervey*'s *Firſt* or *Second* Return, that the Lady told you ſhe would carry you to ſee the Child?

Ann Cradock. I believe the Firſt Time.

Mr. Solicitor General. Do you recollect how long that was after the Marriage?

Ann Cradock. I do not recollect.

Mr. Solicitor General. When did you marry Mr. *Hervey*'s Servant?

Ann Cradock. The 11th of *February* 1752.

Mr. Solicitor General. Did the Priſoner at the Bar ſay any Thing particular to you about the Child?

Ann Cradock. She told me the Child was a Boy, and like Mr. *Hervey.*

Mr. Solicitor General. How long did you continue in the Service of Mrs. *Hanmer?*

Ann Cradock. Till ſhe died.

Mr. Solicitor General. When did Mrs. *Hanmer* die?

Ann Cradock. She has been dead Eleven Years the Second of laſt *December.*

Mr. Solicitor General. Had you any Occaſion to know what became of the Child, whether it lived or died?

Ann Cradock. I know nothing further than what the Lady ſaid. When I expected to go to ſee it, the Lady came in great Grief, and told me it was dead.

Mr. Solicitor General. Have you any Reaſon to know at what Place the Child was born?

Ann Cradock. At *Chelſea*, by reaſon her Mother could not go there.

Mr. Solicitor General. Who informed you that the Child was born at *Chelſea?*

Ann Cradock. Mrs. *Hanmer* told me this.

Mr. Solicitor General. Have you ever heard it from the Priſoner?

Ann Cradock. Yes, I certainly have.

Mr. Solicitor General. She ſaid, her Mother could not go there. What do you underſtand to be the Reaſon, why Mrs. *Chudleigh* could not go to *Chelſea?*

Ann Cradock. By reaſon her Huſband and Son were buried there, as I have been told.

Mr. Solicitor General. Had you any Converſation with the Priſoner about the Year 1768, about any Meſſage to be delivered to the Priſoner, that Mr. *Hervey* had given to you?

Ann Cradock. I had a Meſſage from Mr. *Hervey*, ſignifying to the Lady he was determined to be parted from her.

Mr. Solicitor General. Did you deliver that Meſſage?

Ann Cradock. Not for ſome Time after I received it, not being able.

Mr. Solicitor General. When did you deliver it?

Ann Cradock. On *Saturday* Morning, when the Lady came up to me, and told me, that ſhe knew what had been the Matter with me: I told her Mr. *Hervey* deſired me to let her know, that he was determined to be, I ſhould have ſaid *divorced*, but I ſaid *parted*; and alſo, that he deſired me to tell the Lady, ſhe had it in her own Power to aſſiſt him. I delivered the Meſſage, and the Lady replied, Was ſhe to make herſelf a Whore to oblige him?

Mr. Solicitor General. Did ſhe appear to be with Child before this Converſation with you?

Ann Cradock. She did appear ſo to be.

Mr. Solicitor General. What Pariſh is Mr. *Merrill*'s Houſe in?

Ann

Ann Cradock. I believe in *St. George*'s: His Houſe at *Lainſton* is a Pariſh of itſelf.

Mr. Solicitor General. Are there any other Houſes in the Pariſh beſides Mr. *Merrill*'s?

Ann Cradock. Not at *Lainſton*, there is not.

Mr. Solicitor General. Was there Service regularly in *Lainſton* Church, or did the Family go to any other Church?

Ann Cradock. They went to Service at *Sparſholt* Church.

Mr. Solicitor General. My Lords, we have no more Queſtions to aſk this Witneſs at preſent.

Lord High Steward. The Counſel for the Priſoner are at Liberty to aſk the Witneſs any Queſtions they think proper.

Mr. Wallace. Have you not declared to ſome Perſons, that you had an Expectation of ſome Proviſion or Benefit on the Event of this Proſecution?

Ann Cradock. I never could declare I had any Thing promiſed me by any Body.

Mr. Wallace. Expectation of Proviſion, from the Perſons that proſecute?

Ann Cradock. I never had, I know none of the Family.

Mr. Wallace. Where have you lived for this Month, or Two, or Three.

Ann Cradock. I have lived at Mr. *Beauwater*'s.

Mr. Wallace. What is the Reaſon of your having your Reſidence there?

Ann Cradock. In regard to his Lady being a Relation to Mr. and Mrs. *Bathurſt.*

Mr. Wallace. Had your Reſidence there any Relation to this Proſecution?

Ann Cradock. It is unknown to me if it has.

Mr. Wallace. What have you to do with Mr. *Bathurſt?*

Ann Cradock. Mrs. *Bathurſt* is ſo kind as to have me there, as being a Servant to her Aunt from my Childhood.

Mr. Wallace. How long have you been at Mr. *Beauwater*'s?

Ann Cradock. I am ſure I cannot juſtly ſay the Day when I came there.

Mr. Wallace. How long before this Proſecution was commenced?

Ann Cradock. I can't tell when I came there; I can't tell how long I have been there.

Mr. Wallace. I do not mean that you ſhould anſwer to a Day, but according to the beſt of your Memory.

Ann Cradock. About Four Months, I fancy.

Mr. Wallace. Was it before or ſince you appeared before the Grand Jury?

Ann Cradock. Since I appeared before the Grand Jury.

Mr. Wallace. Do you know who is the Proſecutor of this Indictment?

Ann Cradock. Mr. *Meadows*, I imagine.

Mr. Wallace. Do you know Mr. *Meadows?*

Ann Cradock. I have ſeen him Twice, or Three Times in my Life, and that is all.

Mr. Wallace. Where?

Ann Cradock. The Firſt Time I ever ſaw him, was at Mr. *Beauwater*'s Houſe, ſince I came to Town.

Mr. Wallace. Are you to ſtay at Mr. *Beauwater*'s, or to return, when this Proſecution is over?

Ann Cradock. The laſt Home I had is at *Lainſton*, where I hope I may return again. I went down there in *Auguſt* was a Twelvemonth.

Mr. Wallace. Have you never declared to any Body, that you had an Expectation of ſome Proviſion from the Cauſe now in Hand?

Ann Cradock. I could not declare it, as I had no Offers made me from the Proſecutor.

Mr. Wallace. Have you declared it?

Ann Cradock. I have juſt now ſaid, I could not.

Mr. Wallace. Would you be underſtood, that you have not?

Ann Cradock. What was I to declare?

Mr. Wallace. Whether you have not declared, whether true or falſe I do not care, that you had an Expectation of ſome Proviſion from this Proſecution?

Ann Cradock. I could not declare it, before it was made to me.

Mr. Wallace. You muſt ſay, whether you did ſay ſo or not?

Ann Cradock. I never had any Offer from the Proſecution.

Mr. Wallace. Had not you an Expectation from the Proſecution?

Ann Cradock. No, I could not ſay that, when they never offered it me.

Mr. Wallace. Do you underſtand the Queſtion generally, or confined to the Proſecutor?

Ann Cradock. I think it can be confined to none but himſelf.

Mr. Wallace. Have you any Expectation from any Body elſe?
Ann Cradock. No, none.
Mr. Wallace. Nor ever declared ſo?
Ann Cradock. No, I never declared, that I had any ſuch Expectations.
Mr. Wallace. At what Time of the Night was this Marriage?
Ann Cradock. I cannot poſſibly tell the Hour; it was at Night.
Mr. Wallace. Have not you mentioned to any Body ſome Hour of the Night?
Ann Cradock. I do not know that I have mentioned it, any farther than that it was at Night.
Mr. Wallace. You have ſaid, that you was employed to keep the Servants out of the Way at the Time; how came you then to go to the Church?
Ann Cradock. I was employed to come out of the Church after the Marriage, and ſee that the Houſe was clear: After the Marriage, and not before.
Mr. Wallace. Was there any Care taken before they went to Church?
Ann Cradock. No, I do not know that there was; Mr. and Mrs. *Merrill* dined out that Day, and I do not know that any of the Houſe knew that there was to be a Marriage.
Mr. Wallace. Are you ſure that Mr. and Mrs. *Merrill* dined out that Day?
Ann Cradock. Yes.
Mr. Wallace. When did Mrs. *Merrill* die?
Ann Cradock. I do not know. Mrs. *Hanmer* it was; there was no Mrs. *Merrill* at that Time.
Mr. Wallace. Then by Mrs. *Merrill* you meant Mrs. *Hanmer*, did you?
Ann Cradock. Certainly I did mean Mrs. *Hanmer*, for there was no Mrs. *Merrill*.
Mr. Wallace. Was you deſired to go to the Church?
Ann Cradock. I don't know whether I was deſired to go, but there I was, that I recollect.
Mr. Wallace. Did you go as a Witneſs, or out of Curioſity?
Ann Cradock. I was there to ſee the Marriage. As to Witneſs, I was not called to be a Witneſs.
Mr. Wallace. Did any of the Parties know you was in the Church?
Ann Cradock. Thoſe that were in the Church knew it.
Mr. Wallace. Did you hear the Ceremony performed?
Ann Cradock. I did.
Mr. Wallace. Did you hear the *whole* Ceremony?
Ann Cradock. I believe ſo: Certainly.
Mr. Wallace. Have not you ſaid, you *did not* hear the Ceremony?
Ann Cradock. Not that I know of, and I never was aſked to my Knowledge.
Mr. Wallace. Do you ſpeak poſitively that you have not ſo declared?
Ann Cradock. Certainly I do, for I know whether I was aſked or not.
Mr. Wallace. How long did Mr. *Hervey* ſtay there after this Marriage?
Ann Cradock. I really cannot ſay how many Days; he was not long there.
Mr. Wallace. You ſaid that Mrs. *Hanmer* made them get up ſoon after they went to Bed; how long did Mrs. *Hanmer* ſit up after that?
Ann Cradock. I cannot juſtly ſay how many Hours; I can't ſay whether it might have been One, or Two, or Three Hours.
Mr. Wallace. Was it Mrs. *Hanmer*'s Cuſtom to lock the Door, where Miſs *Chudleigh* lay?
Ann Cradock. I never knew, that ſhe did lock the Door at all.
Mr. Wallace. Nor any Body by her Order?
Ann Cradock. Not to my Knowledge, I never knew the Door ordered to be locked by any Body, nor by myſelf neither: I am ſure I never locked it.
Mr. Wallace. You are ſure the Door was never locked then, when Mr. *Hervey* went out, when he was made to get up and leave the Room as you have ſaid?
Ann Cradock. Went out where? I don't underſtand.
Mr. Wallace. You have ſaid, he was made to get up again.
Ann Cradock. To the beſt of my Knowledge, the Lady got up too, as well as Mr. *Hervey*.
Mr. Wallace. And both left the Room?
Ann Cradock. I believe they both left the Room, I know nothing to the contrary; but I know they afterwards went to Bed together.
Mr. Wallace. Have you not declared, you knew nothing of this Marriage?

Ann Cradock. No, never in my Life, to my Knowledge.

Mr. Wallace. That you did not remember any Thing about it?

Ann Cradock. It is very odd that I can remember it now, and ſhould not have remembered it before: I ever had it in my Memory.

Mr. Wallace. Have not you declared, that you did not remember it?

Ann Cradock. No, not that I know of.

Mr. Wallace. I deſire you will give a poſitive Anſwer, yes, or, no, whether you have or have not declared it?

Ann Cradock. I never could have declared, that which I did not know.

Mr. Wallace. That you did not remember any Thing about it?

Ann Cradock. No, I never could ſay that.

Mr. Wallace. Did you or did you not ſay ſo?

Ann Cradock. No, I did not ſay ſo.

Lord Buckingham. I beg to put One Queſtion to the Witneſs. You know that you ſpeak not only in the Preſence of this reſpectable Court, but in the Preſence of Almighty God?

Ann Cradock. Yes.

Lord Buckingham. Have you, or have you not, ever declared that you did expect an Advantage from the Proſecution? Say aye, or no.

Ann Cradock. I muſt ſay no: I could not ſay aye.

Lord Buckingham. You have told us, that Mr. *Merrill* and Mrs. *Hanmer* went out to Dinner the Day, on which the Marriage was performed; I ſhould be glad to know at what Time Mr. *Merrill* and Mrs. *Hanmer* returned home?

Ann Cradock. I believe it might be between Seven and Eight o'Clock, as I had given Tea out of the Houſekeeper's Room to the Gentleman and Lady by Candle-light.

Lord Buckingham. What Day of the Month was it?

Ann Cradock. That I cannot tell.

Duke of Grafton. Did you ever ſee the Child, that the Lady at the Bar offered to carry you to ſee?

Ann Cradock. No, I never did.

Duke of Grafton. What was the Interval of Time between the Offer to carry you to ſee the Child, and the Death of that Child?

Ann Cradock. That I cannot juſtly ſay neither; but as far as I can remember, the Day that I was to go to ſee the Child, the Lady came and ſaid it was dead.

Duke of Grafton. Though you cannot exactly recollect the Interval between the One Tranſaction and the other, yet ſtill you may ſpeak at large. Was it a Week? Was it a Month? Was it Half a Year?

Ann Cradock. It was not a Month, *nor yet Half a Year.*

Duke of Grafton. Were there a few Days Interval between the one and the other?

Ann Cradock. There was, but I cannot ſay how many Days.

Duke of Grafton. Did you, in the Space of theſe few Days, ever expreſs to the Lady at the Bar your Earneſtneſs and Deſire to ſee the Child, which you ſay the Lady at the Bar told was ſo like Mr. *Hervey?*

Ann Cradock. I expreſſed my Deſire at the Time, when the Lady ſpoke of the Child to her Aunt.

Duke of Grafton. What was the Anſwer, that you had for not carrying you immediately to the Child?

Ann Cradock. The Lady told me, ſhe would come on ſuch a Day with the Princeſſes Coach, and that I ſhould go and ſee the Child.

Duke of Grafton. Was you examined by the Eccleſiaſtical Court?

Ann Cradock. I was not.

Duke of Grafton. Did you know at the Time, that there was ſuch a Proceſs going on here?

Ann Cradock. I was told by Mr. *Hervey* there was.

Duke of Grafton. Did you offer to Mr. *Hervey*, or to any other of the Parties, to give that Evidence which you now have proved it was material to give?

Ann Cradock. He told me, he muſt call upon me to aſſiſt him in his Marriage.

Duke of Grafton. Did any Thing elſe paſs relative to the Proceſs in Doctors Commons, after Mr. *Hervey*'s Converſation with you?

Ann Cradock. Yes, there certainly was, though I never was called.

Duke of Grafton. Did any Thing paſs between Mr. *Hervey* and you, or between any of the Parties and you, after that Declaration of Mr. *Hervey*'s to you?

Ann

Ann Cradock. I was to acquaint the Lady with his Intentions.

Duke of Grafton. You ſaid you was to remove the Servants out of the Way at Mr. *Merrill*'s Houſe at the Time of the Marriage: How many Servants might there be about Mr. *Merrill*'s Houſe at the Time of the Marriage?

Ann Cradock. The Butler; a Maid, who waited on Miſs *Merrill*; Two Houſe-maids; a Laundry-maid; One of the Houſe-maids belonged to Mrs. *Hanmer*, who always went down along with her, and there was a Kitchen-maid.

Duke of Grafton. Were there any Lights in the Church at the Time of the Ceremony being performed?

Ann Cradock. There was a Wax Light in the Crown of Mr. *Mountenay*'s Hat.

Lord Townſhend. Whether ſhe has ever received or been offered any Thing to withhold her Evidence relative to the ſuppoſed Marriage?

Ann Cradock. I never have.

Lord Hillſborough. Did you ever receive any Letter, offering you any Advantage in caſe you would appear againſt the Priſoner, before you was ſubpœned at *Hick*'s *Hall.*

Ann Cradock. I received a Letter from a Friend, wherein I was told, that a Gentleman of their Acquaintance would get me a Sine-cure, but on what Account I knew not.

Lord Hillſborough. A Gentleman of whoſe Acquaintance?

Ann Cradock. I do not know who the Gentleman was; it never was explained to me who the Gentleman was; nor I never aſked.

Lord Hillſborough. Who was the Friend who wrote that Letter to you?

Ann Cradock. Mr. *Fozard*, of *Piccadilly.*

Lord Hillſborough. What Anſwer did you make to that Letter?

Ann Cradock. I made no Anſwer any further, but that it was very kind in any Body that would aſſiſt me in getting me any Thing.

Lord Hillſborough. Who is Mr. *Fozard?*

Ann Cradock. A Perſon that lives near *Hyde-park-Corner*, and keeps Livery Stables.

Lord Hillſborough. You ſay he wrote you Word, that ſome of their Friends would get you a Sine-cure?

Ann Cradock. I ſaid, a Gentleman of their Acquaintance.

Lord Hillſborough. Of whoſe Acquaintance?

Ann Cradock. Mr. *Fozard*'s.

Lord Hillſborough. Upon what Account did you conceive or underſtand that he was to get you a Sine-cure?

Ann Cradock. That I cannot tell.

Lord Hillſborough. What have you done with the Letter?

Ann Cradock. I do not know where the Letter is, I know I have it not.

Lord Hillſborough. Will you take upon you to ſay, that there was not in that Letter an Expreſſion intimating, that if you would appear againſt the Priſoner at the Bar, a Sine-cure would be gotten for you?

Ann Cradock. I certainly do ſay, there was no ſuch Expreſſion in the Letter; only a Friend of theirs, or a Gentleman of their Acquaintance, I do not know which, would get me a Sine-cure.

Lord Hillſborough. Did you, or did you not, by virtue of your Oath, underſtand that that was to be the Conſequence of your appearing againſt the Priſoner at the Bar?

Ann Cradock. I did not know that that was to be the Conſequence of my appearing. I had no room to imagine ſo, becauſe I know not the Perſon of the Proſecutor, nor none of his Family.

Lord Hillsborough. Did you adviſe with any Body concerning what you ſhould do with regard to that Letter?

Ann Cradock. I certainly did apply to a Friend, and acquainted him I had received ſuch a Letter.

Lord Hillsborough. What did you write to your Friend?

Ann Cradock. I never writ to any Friend, I applied to a Friend, and ſhewed the Letter.

Lord Hillsborough. Whether you did not aſk Advice from ſome Body, what you ſhould do with regard to that Letter?

Ann Cradock. I did not aſk any Body what I was to do with it, I received it.

Lord Hillsborough. What did you conſult that Friend about?

Ann Cradock. To let him know I had received ſuch a Letter; but I did not know what it might be upon, or what it might not.

Lord Hillsborough. Did he read the Letter?

Ann Cradock. Yes.

Lord Hillsborough. What Converſation paſſed between you and him on the Subject of the Letter?

Ann Cradock. I told him, I did not know what it might be from, but that I apprehended it might be ſomething concerning my being called upon in Point of the Lady; I think I told him, that I had once been told, that I might have the ſame ſettled upon me as the Lady promiſed me when I went into the Country.

Lord Hillsborough. What Reaſon had you for thinking ſo?

Ann Cradock. The Reaſon I had for thinking ſo, was, becauſe I had been told once, that I might have the ſame given me that the Lady at the Bar offered me, when I was to go into the Country, if I would ſpeak the Truth; but by whom I know not: I never aſked the Queſtion.

Lord Hillsborough. I deſire to know, what you did with that Letter, whether you put it into the Hands of the Perſon whom you conſulted?

Ann Cradock. I put it into no one's Hands; the Perſon had the Letter I conſulted.

Lord Hillsborough. You put it into that Perſon's Hand to read it?

Ann Cradock. I gave the Letter into that Perſon's Hands to read it, and told him, he might ſhew it to Mr. *Hervey*, if he would.

Lord Hillsborough. For what Purpoſe did you deſire it might be ſhewn to Mr. *Hervey?*

Ann Cradock. For this Purpoſe, believing it might be againſt him, and the Lady; but by whom I knew not, for I never aſked the Queſtion, who it was that was to give it.

Lord Hillsborough. Did you deſire your Friend to ſhew it to the Priſoner at the Bar?

Ann Cradock. That was impoſſible, for the Lady was not in *England.*

Lord Hillsborough. Did you then deſire him to ſhew it to any Body on her Part?

Ann Cradock. I ſhould look upon it, if it was ſhewn to Mr. *Hervey*, it would be on her Part, as being Man and Wife.

Lord Hillsborough. Whether you deſired it to be ſhewn to any Body elſe?

Ann Cradock. No, not beſides Mr. *Hervey.*

ADJOURNED.

SATURDAY, APRIL 20.

ANN CRADOCK.

Continuation of her Examination.

LORD Hillsborough. I was exceedingly glad the Houſe was adjourned, but I would much rather it had been adjourned ſooner, becauſe I now lie under a good deal of Difficulty to reſume the Thread of theſe Queſtions, that for my own Information, and for that of the Houſe, I thought highly proper and neceſſary to be explicitly and exactly anſwered. My Lords, I think the laſt Queſtion that I put to the Witneſs at the Bar, was, whether ſhe had put that Letter, which ſhe ſaid was ſigned by *Fozard*, into the Hand of any other Perſon? If I do not miſtake, my Lords, ſhe ſaid, ſhe had put it into the Hand of a Friend of hers to read. Upon aſking her, Whether ſhe *had* any other Intention, than that of putting the Letter into his Hand? I think ſhe ſaid, ſhe told the Perſon he might ſhew the Letter to Mr. *Hervey*, as ſhe apprehended it related to him. Now I deſire to aſk the Evidence at the Bar, Whether ſhe knows, that her Friend did ſhew that Letter to Mr. *Hervey* or not?

Ann Cradock. My Friend did ſhew it to Mr. *Hervey.*

Lord Hillsborough. Did your Friend tell you what Mr. *Hervey* ſaid concerning the Letter?

Ann Cradock. My Friend told me, that he deſired I ſhould keep the Letter.

Lord Hillsborough. Do you mean Mr. *Hervey*, or the Friend deſired you to keep the Letter?

Ann Cradock. I mean, the Anſwer, that was given upon the Letter being ſhewn, was brought by my Friend, and Mr. *Hervey* deſired me to keep the Letter.

Lord

Lord Hillsborough. Did your Friend, who carried the Letter from you to Mr. *Hervey*, ſay any Thing more to you, than that Mr. *Hervey* deſired you ſhould keep the Letter?

Ann Cradock. He told me, that I ſhould acquaint the Lady that was abroad with it.

Lord Hillsborough. Did you acquaint the Lady that was abroad with it?

Ann Cradock. I had it not in my Power ſo to do.

Lord Hillsborough. Did you acquaint any Body elſe with it?

Ann Cradock. I did ſeveral of my Acquaintance.

Lord Hillsborough. In particular, did you acquaint any Body that was concerned in Buſineſs for the Lady?

Ann Cradock. No.

Lord Hillsborough. I deſire to know whether you did by yourſelf, or by any Body elſe for you, make any Anſwer whatever to the Letter to Mr. *Fozard?*

Ann Cradock. I went to Mr. *Fozard* when I received the Letter, as in the Letter it was required to know my Age, and where I was born.

Lord Hillsborough. I deſire you will inform their Lordſhips of the Whole of what paſſed between Mr. *Fozard* and you at that Interview?

Ann Cradock. Nothing in particular, further than relating to where I was born, and my Age; my Age I did not know. I did not aſk, who was to give me the Sine-cure.

Lord Hillsborough. Did not you think it extraordinary, that Mr. *Fozard* ſhould inquire of you your Age, and where you was born?

Ann Cradock. I certainly did think it extraordinary.

Lord Hillsborough. Whether you did not aſk the Meaning of it?

Ann Cradock. I did not aſk any Meaning for it.

Lord Derby. You ſaid Yeſterday, that you did expect to receive ſomething adequate to what you had received from the Priſoner at the Bar. What did you formerly receive from the Priſoner at the Bar?

Ann Cradock. Many Favours in Friendſhip, but not any Thing in particular.

Lord Derby. What was you offered by the Lady?

Ann Cradock. Twenty Guineas a Year, to go and ſettle in the Country, and the Choice of Three different Counties.

Lord Derby. At what Time was that Offer made to you?

Ann Cradock. The Time I cannot juſtly remember.

Lord Derby. Recollect; how many Years was it ago?

Ann Cradock. I believe it may be Three Years ago, or Four, I am not certain.

Lord Derby. What was your Anſwer to that Propoſal?

Ann Cradock. It made me very unhappy to think that I was to be baniſhed, but I conſented to go into *Yorkſhire*.

Lord Derby. What were the Counties that were propoſed to you?

Ann Cradock. *Yorkſhire*, *Derbyſhire*, I think, and *Northumberland*.

Lord Derby. In conſequence of that Conſent to go into *Yorkſhire*, did you go into *Yorkſhire?*

Ann Cradock. No, I did not; I went to *Thorſeby*; I tried, but I could go no further.

Lord Derby. What was the Reaſon that you could go no further?

Ann Cradock. From being unhappy, and going from all my Friends.

Lord Derby. Did you receive any Sum of Money in conſequence of going as far as *Thorſeby?*

Ann Cradock. None, no further than was to carry me to the Place, where I ſaid I was to go.

Lord Derby. You mentioned an Annuity of Twenty Guineas a Year; has that Annuity been paid, or have you received any Part of it ſince that Agreement?

Ann Cradock. No.

Lord Coventry. You ſaid you was preſent at the Marriage in 1744; I deſire to know whether you have ever communicated that Information to any Perſon till this Year, and to whom?

Ann Cradock. I have ſeveral Times to many, but to particular Perſons I cannot ſpeak.

Lord Derby. I ſhould be glad to know whether you do underſtand, or do not underſtand, that any Sum or Sums were ever paid to any Perſon for your Subſiſtence and Board, on the Part of the Priſoner at the Bar?

Ann Cradock. No, I do not know that ever any Sum was paid upon my Account.

Lord Buckingham. I deſire to aſk the Witneſs, whether ſhe at any Time did receive any Preſent whatever from the Priſoner at the Bar?

Ann Cradock. Several, in Point of Friendſhip.

Lord Townſhend. Was you ever offered any Sum of Money at any Time, to conceal any Evidence?

Ann Cradock. No.

Lord Townſhend. By either Side?

Ann Cradock. No.

Lord Camden. I deſire to know whether you ſaw the Lady at *Thoresby* in the Way to *Yorkſhire?*

Ann Cradock. I was in the Lady's Houſe, and ſaw her ſeveral Times.

Lord Camden. In any of thoſe Interviews did any Thing paſs reſpecting the Annuity of Twenty Guineas a Year, and the Journey you was then making to *Yorkſhire?*

Ann Cradock. No, not any Thing in particular as to that.

Lord Camden. What was the Reaſon of your Return from *Thoreſby*, and not going to your Journey's End?

Ann Cradock. My Reaſon was, from my ill State of Health, and Unhappineſs of Mind.

Lord Littleton. Did the Lady explain to you what were her Motives for ſending you, or, as you called it, *baniſhing* you, into thoſe diſtant Counties?

Ann Cradock. No, my Lords.

Lord Derby. What did you apprehend to be the Lady's Motives for ſuch a Propoſal?

Ann Cradock. That I was ever at a Loſs to know, becauſe I never aſked.

Duke of Ancaſter. Did you conſult a Friend on account of the Subſtance of Mr. *Fozard*'s Letter?

Ann Cradock. I did.

Duke of Ancaſter. I deſire you to tell the Houſe, who that Friend was?

Ann Cradock. My Friend was Dr. *Hoſſack*, who is Phyſician of *Greenwich* Hoſpital.

Duke of Ancaſter. What is become of that Letter, or have you it?

Ann Cradock. I have it not, but it is in my Box, I believe, at *Lainſton*, as I carried it with me when I went there with my other Things.

Duke of Richmond. Was not the Marriage to be kept a Secret?

Ann Cradock. Yes.

Duke of Richmond. If during the Time the Marriage was to be kept a Secret, any Perſon had aſked you about the Marriage, would you have owned it, or denied it?

Ann Cradock. I never from the Time divulged the Secret, until it had been told before.

Duke of Richmond. Did no Perſon, during the Time it was a Secret, ever aſk you if you knew it?

Ann Cradock. Several have aſked me, but I have always replied, *No.*

Lord Preſident. Do you not know, that your Huſband was examined in the Spiritual Court, in the Cauſe of Jactitation?

Ann Cradock. I know he was called upon in the Court, but what paſſed I am an utter Stranger to, as I never aſked.

Lord Preſident. Had not Mr. *Hervey* intimated to you, that you was to be called upon on that Occaſion?

Ann Cradock. He did.

Lord Preſident. After that did you hear any Thing from Mr. *Hervey*, reſpecting your Attendance in that Cauſe?

Ann Cradock. Mr. *Hervey* told me, he muſt call upon me to aſſiſt him in the Marriage, and to ſwear to Mrs. *Hanmer*'s Hand-writing.

Lord Preſident. Was you ever called upon that Occaſion?

Ann Cradock. I was not.

Lord Derby. Did you live with Mrs. *Hanmer* until the Time of her Death?

Ann Cradock. I did.

Lord Derby. Which happened Eleven Years ago the 2d of laſt *December?*

Ann Cradock. Yes.

Lord Derby. Upon what have you ſubſiſted ſince that Time.

Ann Cradock. Mrs. *Hanmer* left me Two hundred Pounds; one was taken up, the other was left: I quitted the Lady's Houſe, and went to *Newington.* I ſhould have told you the Two hundred Pounds were in this Lady's Hands [*pointing to the Ducheſs*] one was taken up, and the other, with my Huſband's Income, ſupported me whilſt he lived.

Lord Derby. How do you know that that Two hundred Pounds was left you by Mrs. *Hanmer?*

Ann Cradock. It was left me in her Will.

Duke of Ancaſter. Do you of your own Knowledge aſſert, that there was a Child?

Ann Cradock. I do aſſert I was told ſo. I never ſaw the Child.

Duke of Ancaſter. Who told you ſo?

Ann Cradock. Mrs. *Hanmer* told me ſo, and the Lady told me at our Return out of the Country.

Duke of Ancaſter. Who told you there was a Child?

Ann Cradock. This Lady at the Bar told me ſo herſelf. Both told me ſo.

Duke of Ancaſter. Do you from your own Knowledge affirm, that that Child is dead?

Ann Cradock. The Lady at the Bar told me it was dead, as ſhe told me before ſhe would take me to ſee it.

Duke of Ancaſter. Did the Lady at the Bar bring the Princeſs of *Wale*'s Coach, and carry you to ſee the Child at *Chelſea?*

Ann Cradock. The Lady told me ſhe would come in the Princeſs's Coach, and carry me to ſee the Child.

Lord Radnor. How old do you apprehend the Child was at the Time of its Death?

Ann Cradock. That I can give no Account of: It was very young; but the Age I know not.

Lord Radnor. Weeks, Months, or Years?

Ann Cradock. Months, but not Years.

Lord Radnor. Did you ever hear, that the Child was baptized?

Ann Cradock. I did hear that the Child was baptized; but Mrs. *Hanmer* and I were in the Country at that Time.

Lord Radnor. Did you ever hear, what the Child's Name was?

Ann Cradock. No, I cannot recollect that I did.

Lord Radnor. Did you ever hear, where the Child was buried?

Ann Cradock. I did hear that it was buried at *Chelſea.*

Lord Radnor. Who told you ſo?

Ann Cradock. The Lady at the Bar told me ſo herſelf one Day, when I was airing in the Coach with her that Way.

Lord Forteſcue. How have you ſubſiſted ſince your Huſband's Death?

Ann Cradock. With what I made of my Furniture which was in my Houſe, which was all new.

Lord Forteſcue. How long is it ſince your Huſband died?

Ann Cradock. Five Years laſt *March.*

Ordered to withdraw.

Lord High Steward. Who do you call next Mr. Solicitor General?

Solicitor General. We deſire to call

Mr. CÆSAR HAWKINS, *who was ſworn in like Manner.*

Mr. Dunning. Mr. *Hawkins*, are you acquainted with the Lady at the Bar? and how long have you been ſo?

Mr. Hawkins. A great many Years: I believe above Thirty.

Mr. Dunning. Are you acquainted with the preſent Lord *Briſtol?* and how long have you been ſo?

Mr. Hawkins. I have had the Honour of knowing the Earl of *Briſtol* nearly as many Years.

Mr. Dunning. Do you know of any Intercourſe between my Lord *Briſtol* and the Lady at the Bar?

Mr. Hawkins. Of an Intercourſe certainly; of Acquaintance undoubtedly.

Mr. Dunning. Do you know from the Parties of any Marriage between them?

Mr. Hawkins. I do not know how far any Thing, that has come before me in a confidential Truſt in my Profeſſion, ſhould be diſcloſed, conſiſtent with my profeſſional Honour. [*Queſtion and Anſwer repeated.*]

Mr. Dunning. I truſt your Lordſhips will ſee nothing in my Queſtion, that can betray confidential Truſt, or diſhonour Mr. *Hawkins* in giving it. My Queſtion is ſimply, whether Mr. *Hawkins* knows, from the Parties, of any Marriage between them?

Lord

Lord High Steward. The Queſtion that was aſked by the Counſel at the Bar, is, "Whether the Witneſs knew, from any Information of either of the Two Parties, that they were married?" The Witneſs objects to it, whether he is to anſwer any Queſtions that are inconſiſtent with his profeſſional Honour: Your Lordſhips are to determine, whether the Queſtion put by the Counſel at the Bar, ſhall be aſked?

Lord Mansfield. I ſuppoſe Mr. *Hawkins* means to demur to the Queſtion upon the Ground, that it came to his Knowledge ſome Way, from his being employed as a Surgeon for one or both of the Parties; and I take for granted, if Mr. *Hawkins*, underſtands that it is your Lordſhips Opinion, that he has no Privilege on that Account to excuſe himſelf from giving the Anſwer, that then, under the Authority of your Lordſhips Judgment, he will ſubmit to anſwer it: Therefore, to ſave your Lordſhips the Trouble of an Adjournment, if no Lord differs in Opinion, but thinks that a Surgeon has no Privilege to avoid giving Evidence in a Court of Juſtice, but is bound by the Law of the Land to do it; [if any of your Lordſhips think he has ſuch a Privilege, it will be a Matter to be debated elſewhere, but] if all your Lordſhips acquieſce, Mr. *Hawkins* will underſtand, that it is your Judgment and Opinion, that a Surgeon has no Privilege, where it is a material Queſtion, in a Civil or Criminal Cauſe, to know whether Parties were married, or whether a Child was born, to ſay, that his Introduction to the Parties was in the Courſe of his Profeſſion, and in that Way he came to the Knowledge of it. I take it for granted, that if Mr. *Hawkins* underſtands that, it is a Satisfaction to him, and a clear Juſtification to all the World. If a Surgeon was voluntarily to reveal theſe Secrets, to be ſure he would be guilty of a Breach of Honour, and of great Indiſcretion; but, to give that Information in a Court of Juſtice, which by the Law of the Land he is bound to do, will never be imputed to him as any ndiſcretion whatever.

Mr. Dunning. My Queſtion is, Whether you knew from either of the Parties, that there was a Marriage between them?

Mr. Hawkins. From the Converſation with both Parties I apprehended there was a Marriage, but nothing appeared in Proof before me: I mean nothing as legal Proof, but *Converſation.*

Mr. Dunning. But did they in Converſation admit, that they were Man and Wife? and is that the Ground upon which you form that Apprehenſion?

Mr. Hawkins. Yes it is; they did admit it in Converſation.

Mr. Dunning. Do you, or do you not, know that a Child was the Fruit of that Marriage?

Mr. Hawkins. Yes, I do.

Mr. Dunning. Can you tell their Lordſhips, about what Time that Child was born? and where?

Mr. Hawkins. About the Time I cannot tell. If I ever put down any Thing in Writing at the Time, I might have deſtroyed it afterwards, according to my Cuſtom, which is to deſtroy Papers that are of no Uſe, and which might be improper to be found after my Deceaſe.

Mr. Dunning. Inform their Lordſhips about what Time this might be, as near as your Memory will enable you to do.

Mr. Hawkins. I ſhould ſuppoſe it was about Thirty Years ago; but I do proteſt I do not know.

Mr. Dunning. Where was this Child born?

Mr. Hawkins. At *Chelſea*, near to *Chelſea* College; but I forget the Name of the Street.

Mr. Dunning. Was this Marriage, and the Birth of that Child, at that Time kept a Secret?

Mr. Hawkins. I was told it was to be a Secret.

Mr. Dunning. Do you know what is ſince become of that Child?

Mr. Hawkins. I believe it died in a little Time afterwards.

Mr. Dunning. By your Anſwer, that you underſtood it was to be kept a Secret, did you mean the Marriage, or the Birth of the Child, or both?

Mr. Hawkins. *Both.*

Mr. Dunning. Which of the Parties can you recollect it was, Mr. *Hervey* or Miſs *Chudleigh*, that deſired this might be kept a Secret? or both?

Mr. Hawkins. I ſhould take for granted both equally.

Mr.

Mr. Dunning. Do you know enough of the then Mr. *Hervey*'s Motions to be able to inform their Lordſhips, whether this Child was born after his Firſt or Second Return from Sea, ſubſequent to the Marriage?

Mr. Hawkins. No, I do not know enough of his Motions to anſwer this Queſtion.

Mr. Dunning. Do you know what Age this Child had attained before its Death?

Mr. Hawkins. I proteſt I do not remember now.

Mr. Dunning. Can you recollect about what Time of the Year it was you firſt heard this Child was born, and about what Time of the Year you heard it died?

Mr. Hawkins. I do not know, I might hear of the Death immediately.

Mr. Dunning. Did you ever attend the Child in the Courſe of your Profeſſion?

Mr. Hawkins. I did once: I am not ſure whether I did not attend more, but I remember I attended it once.

Mr. Dunning. Do you remember whether your Recollection of this Tranſaction was, or was not, helped about the Time of the Commencement of the Suit in the Spiritual Court?

Mr. Hawkins. Really I do not know any Thing that paſſed to bring it to my Mind then.

Mr. Dunning. Was you, or was you not, applied to by either of the Parties, or both, at the Time of the commencing this Suit in the Spiritual Court?

Mr. Hawkins. I was applied to by the Earl of *Briſtol.*

Mr. Dunning. Will you be ſo good as to tell what was the Purport of Lord *Briſtol*'s then Application to you.

Mr. Wallace. On the Part of the noble Lady, I muſt ſubmit to your Lordſhips, that nothing ſaid in the Abſence of the Lady is Evidence againſt the Priſoner at the Bar.

Mr. Dunning. I will put the Queſtion in a Way, that it ſhall be liable to no Objection. Did you, or did you not, in conſequence of Lord *Briſtol*'s Application, apply to the Lady at the Bar?

Mr. Hawkins. I did.

Mr. Dunning. Then tell us, what was the Purport of Lord *Briſtol*'s Application to you, and what Meſſage you carried from Lord *Briſtol* to the Lady at the Bar?

Mr. Hawkins. To the beſt of my Remembrance the Earl of *Briſtol* met me in the Street, and ſtopped me, telling me that he ſhould be glad I would call on him at his Houſe the firſt Morning I had Half an Hour to ſpare, and that if I could then fix the Time, he would take Care to be in the Way, and that no other Company ſhould interrupt the Converſation. He intimated that it was not on account of his own Health, but on account of an old Friend of mine. I named the Time, and went to him; I found his Lordſhip expecting me; upon a Table, at a little Diſtance from his Right Hand, there lay Two or Three Bundles of Papers, folded up as theſe Papers are *(taking up ſome Papers at the Bar)* to theſe Papers he often pointed in Courſe of what he ſaid afterwards. After making ſome polite Apologies to me for the particular Trouble he was then giving me, he told me it was on the preſent Ducheſs of *Kingſton*'s Account: That he wiſhed me to carry her a Meſſage upon a Subject that was very diſagreeable, but that he thought it would be leſs ſhocking to be carried by, and received from, a Perſon ſhe knew, than from any Stranger: That he had been for ſome Time paſt very unhappy on account of his Matrimonial Connections with the Ducheſs, Miſs *Chudleigh*, that was then: That he wiſhed to have his Freedom; which the Criminality of her Conduct, and the Proofs which he had of it (which, in pointing to the Papers I before mentioned, he ſaid he had for ſome Time paſt, with Intent and Purpoſe to procure a Divorce, been collecting and getting together); that he believed they contained the moſt ample and abundant Proofs, Circumſtances, and every Thing relative to ſuch Proof; that he intended to purſue his Proſecution with the ſtricteſt Firmneſs and Reſolution; but that he retained ſuch a Regard and Reſpect for her, and as a Gentleman to his own Character, that he wiſhed not to mix Malice or ill Temper in the Courſe of it; but that in every Reſpect he would wiſh to appear and act on the Line of a Man of Honour and of a Gentleman; that he wiſhed (he ſaid) ſhe would underſtand that his ſoliciting me to carry the Meſſage ſhould be received by her as a Mark of that Diſpoſition; that as moſt probably in the Number of ſo many teſtimonial Diſpoſitions as were there collected, there might be many offenſive Circumſtances named, ſuperfluous to the neceſſary legal Proofs, that if ſhe pleaſed I might inform her, that her Lawyers, either with or without herſelf, might, in Conjunction with his Lawyers, look over all the Depoſitions, and that if any Parts were found tending to indecent or ſcandalous Reflections, which his Gentlemen of the Law ſhould think might be omitted without weakening his Cauſe, he himſelf ſhould have no Objection to it: That as he in-

tended only to act upon the Principles of a Gentleman, and a Man of Honour, he ſhould hope ſhe would not produce any unneceſſary or vexatious Delays to the Suit, or enhance the Expences of it, as he did not intend to proſecute to gain by any Demands of Damages, I think, or to that Purpoſe. I delivered this Meſſage to the Ducheſs as well as I could. I do not preſume now, that either the preciſe Words, or the Indentity of the Words or Expreſſions can be recollected by me, but it was to the Purport, as near as poſſibly I can remember, of what I have ſaid.

Mr. Dunning. Will you recollect, whether upon this Converſation any diſtinct Propoſition was ſtated to the Ducheſs which required an Anſwer? or, what Anſwer you carried back from the Ducheſs for that Purpoſe? You will of courſe be referring yourſelf to what paſſed between you and the Ducheſs.

Mr. Hawkins. I delivered my Meſſage to the Ducheſs. After a little Time taken for Conſideration, I do not recollect exactly what her Grace deſired me to report to the Earl of *Briſtol*; but it was to this Effect: That ſhe was obliged to him for the polite Parts of his Meſſage, but, as to the Subject of the Divorce, ſhe ſhould cut that ſhort by wiſhing him to underſtand, that ſhe did not acknowledge him for her legal Huſband, and ſhould put him to the Defiance of ſuch Proof: That ſhe had then already, or ſhould immediately, inſtitute a Suit in the Eccleſiaſtical Court, which ſhe called, I think, *a Jactitation of Marriage*; but, as he had promiſed before, that he would act upon the Line of a Man of Honour and a Gentleman in his own intended Suit, ſhe hoped that he would purſue the ſame Line now, and that he would confine himſelf to the Proofs of legal Marriage only, and not to other Proofs of Connections or Cohabitations; if he did, that he would make it a Proceſs of no long Delay, and that either he would gain an equal Freedom to himſelf by a Sentence of that Court, declaring them to be free, or he would the ſooner be able to inſtitute his own intended Suit.——The Earl of *Briſtol* received my Meſſage as one affected and ſtruck by it, making no Reply or Anſwer for Two or Three Minutes; then, not ſpeaking to me, but rather ſeeming to expreſs his own Thoughts aloud in ſhort Sentences, that he did not conceive he ſhould have his equal Freedom by that Method. I believe I ſhould have mentioned, that her Grace deſired, in Part of her Meſſage, that nothing might be brought forwards, which might be the Subject of uſeleſs Converſation and Scandal. He ſaid, in Reply, that he was no more inclined to bring forward any Thing for the Lovers of ſcandalous Converſation only, than ſhe could be, and that, if he could not eſtabliſh the Proof of legal Matrimony (I do not remember the Words, but to the Senſe of this) that he was too much a Gentleman to bring any Thing before the Public relative to other Connections with the Lady. I do not remember that any Thing material paſſed, or more than this.

Mr. Dunning. Do you recollect that in any ſubſequent Converſation with the Lady, you was deſired to apply to the Gentleman for any other Civility in the Courſe of this Cauſe?

Mr. Hawkins. Before the Firſt Attendance that I have lately alluded to in Illneſs, Mrs. *Chudleigh*, her Mother, did us the Honor of a private Family Friendſhip. After theſe Meſſages, her Grace now and then called on my Wife in an Evening, frequently ſaying, ſhe was paſſing to or from her Law Gentlemen. When I happened to ſee her Grace, I every now and then aſked how her Suit went on? to which, I think, ſhe always ſeemed to anſwer chearfully, "*Very right*," and "*Well.*"

Mr. Dunning. Did you ever carry any other Meſſages?

Mr. Hawkins. Two or Three Times, I cannot recollect which, ſhe aſked me to deliver ſome Meſſage to the Earl of *Briſtol*, I am not ſure whether one was not a Letter, or whether upon the Occaſion of her aſking me to deliver Something, for my own Memory I might not aſk her to write it down, but I really do not remember at preſent, though I have endeavoured to recollect what the Subject of theſe Meſſages were; but I know they were of very trifling Import, nothing that could have ſtruck me ſtrongly, or I ſhould have remembered them; and I underſtood they were rather given to me, as if the Earl of *Briſtol* was delicate in receiving any Meſſage from her Grace, and that I was only to expect a verbal Anſwer on that Account.

Mr. Dunning. Do you recollect, whether any of theſe Meſſages related to any Witneſs or Witneſſes to be produced or kept back?

Mr. Hawkins. Certainly not; I never had a Suppoſition, that the Ducheſs would have given me ſuch a Meſſage. Nothing appeared to me, but what contained Matter of little Import, and of the moſt honourable Kind.

Mr. Dunning. Did you ever obſerve, or do you now recollect, any Ground to form a Belief, whether the Parties had forgotten or remembered, that there was then living one of the Witneſſes to the Fact of the Marriage.

Mr.

Mr. Hawkins. I profeſs I do not recollect that: I have heard it in common Converſation in the Town, but not that ever I remember from either him or her at that Time.

Mr. Dunning. At what Time did you receive that Report from him or her?

Mr. Hawkins. I think I have ſeen the Earl of *Briſtol* but once ſince the Commencement of this Proſecution, and then his Lordſhip ſeemed rather to ſpeak peeviſhly.

Lord Mansfield. They will not examine to what Lord *Briſtol* has ſaid ſince the Commencement of the Proſecution.

Mr. Dunning. Was any Thing, that my Lord *Briſtol* ſaid on that Subject, communicated to the Lady?

Mr. Hawkins. I certainly might, and did, I believe, tell her Grace what was ſaid.

Lord Mansfield. Then you may go on.

Mr. Dunning. Then tell the Houſe what Lord *Briſtol* ſaid, and you repeated to the Lady?

Mr. Hawkins. His Lordſhip ſeemed to be peeviſh, that ſuch a Perſon was now brought forward, and as he had heard it ſuppoſed, I believe, for want of her having ſuch Allowance or ſuch Care taken of her by the Ducheſs, as he ſuppoſed ſhe uſed to have. If I underſtood him right, the Earl of *Briſtol* ſaid, this Perſon had been with him to expreſs Things to that Purpoſe; and ſaid, that if ſhe had been as eaſy to come at, or had had as good a Memory when that Cauſe was carried on in the Eccleſiaſtical Court, that he believed the Iſſue of it would have been different.

Mr. Dunning. Will you be ſo good as to recollect, whether you communicated this to the Lady, and what paſſed upon that Occaſion?

Mr. Hawkins. I did communicate it to the Ducheſs; and I thought ſhe was rather out of Temper with the Meſſage, or with me, ſhe calling at my Houſe at a Time I was very much in Haſte to go out upon Buſineſs, and could not give her Grace that Time to hear, what ſhe ſeemed to wiſh to have to talk more upon it. She offered to come again, but I was then not well in my Health at all, and perhaps, as ſhe might think, not quite ſo civil, would not name another Time with her Grace for her to call upon me, but ſaid, that I would take an Opportunity, as ſoon as I was able, of waiting upon her Grace at her own Houſe. I did do this ſome Time after, and was told at the Door, that her Grace was not at Home; I left my Name, and ſaid I ſhould call again. After ſome Days Interval I did ſo, and then was told, that her Grace was at Home, but was laid down to Sleep; from whence I concluded, that I was not to call again.

Mr. Dunning. Am I to underſtand from you, that this laſt Meſſage from my Lord *Briſtol* was never the Converſation between you and the Ducheſs?

Mr. Hawkins. I did relate it to her during the Time, that ſhe was at my Houſe.

Mr. Dunning. Have you at any Time ſince heard any Thing from the Ducheſs on that Subject?

Mr. Hawkins. I did hear, but not from any good Authority, that her Grace was rather angry.

Mr. Dunning. Has the Lady never converſed with you on the Subject of this living Witneſs to the Marriage from that Time to this?

Mr. Hawkins. I have never ſeen her Grace but once ſince, and that was Yeſterday Morning for a few Minutes at the Duke of *Newcaſtle*'s.

Mr. Dunning. Generally, at any Time whatever have you heard any Thing from the Ducheſs on the Subject of this living Witneſs to the Marriage, where ſhe was, or any Thing concerning her?

Mr. Hawkins. I proteſt nothing concluſive. I might hear there was ſuch a Perſon, but it was never related to me, whether ſhe was a better, or worſe Evidence; nothing relative to that, whether ſhe was a better or worſe Evidence, or that ſhe was afraid of her, or any Thing to that Purpoſe.

Mr. Dunning. Am I to underſtand you to have heard her ſay, that there was ſuch a Witneſs?

Mr. Hawkins. In what looſer Converſation I cannot tell, but nothing that ever made me know, that there was ſuch a Perſon, who had ſuch material Knowledge.

Mr. Dunning. I underſtand you, that from Lord *Briſtol* you underſtood there was a ſurviving Witneſs to the Marriage. My Queſtion is, Whether you ever learnt the ſame Thing from the Lady, or not?

Mr. Hawkins. If it was, it was ſome accidental looſer Converſation, not as truſting me with ſuch a Knowledge.

Mr. Dunning. Was it then mentioned in any looſer or accidental Converſation, or any Converſation?

Mr. Hawkins. I proteſt, it is impoſſible to remember that with any Degree of Preciſion or of Uſe.

Mr. Dunning. I did not mean to aſk you to recollect any Particulars of the Converſation, but ſimply to the Point, whether the Ducheſs ever ſtated to you, or acknowledged, there was a living Witneſs to the Marriage?

Mr. Hawkins. No, I do not remember that ſhe ever ſtated to me, or ſaid, that there was a living Witneſs to the Marriage.

Mr. Dunning. Is it a Fact that ever you learned from the Lady?

Lord Derby *moved the Clerk might read this Part of the Evidence.*

Mr. Hawkins. I rather (if I may ſay any Thing) underſtood from her Grace, that there was ſome looſer Marriage, not quite in the common Manner. I think I could remember an Expreſſion of her Grace's once, upon her Grace's ſpeaking on the Occaſion. If I remember, I aſked her Grace how her Suit went on? This was towards the latter Part of it. She looked grave, and deſired to ſpeak to me in another Room. She ſaid, that ſhe had had a great Deal of Concern and Agitation of Mind, ſince ſhe laſt ſaw me, which I remarked to her had been for a longer Interval of Time on her not calling at the Houſe upon my Wife in the uſual Manner. Her Grace ſaid, that ſhe had had ſo much Concern upon what ſhe had not expected at the Commencement of her Suit, from finding that a poſitive Oath was expected from her Grace that ſhe was not married, and which ſhe had for ſome Time together apprehended would be put to her in that Form, that ſhe thought ſhe ſhould have dropped her Suit entirely, for that ſhe would not for the whole World have taken that direct Kind of poſitive Oath; but that what had been offered to her, had been ſo complicated (I think, I underſtood) with other Things that were certainly not true, that ſhe could and had taken the Oath with a very ſafe Conſcience. To ſome Queſtions, I do not remember the Words to her Grace from me, how then ſhe came to inſtitute a Suit at all? She anſwered me, "O, for that Matter (I think it was) the Ceremony as done, "was ſuch a ſcrambling ſhabby Buſineſs (I do not ſay theſe were the preciſe Words, but "to that Purport) and ſo much incomplete, that ſhe ſhould have been full as unwilling "to have taken a poſitive Oath that ſhe was married, as that ſhe was not married."

N. B. *This Part of the Evidence was ordered to be read by the Clerk, who accordingly read it.*

Mr. Dunning. I ſhould be glad, if you would tell their Lordſhips, what it was that was ſo particular in this Buſiineſs? if the Lady ever explained it to you?

Mr. Hawkins. I never had an Explanation from that Moment. I had within myſelf a Curioſity from the Time that I carried the Meſſage to my Lord *Briſtol* from her Grace, and his Reception of it; I had rather imagined that there was ſome Marriage of which legal Proofs could not be produced, but that was only my own Notion: Before that Time I had no real Authority at all; I did not know myſelf honeſtly what to think of it.

Mr. Dunning. Did the Lady ever explain to you, by what Reaſon it happened, that the Queſtion, when it came to be put, came in ſo much more palatable a Form than ſhe expected it?

Mr. Hawkins. No, not in the leaſt: I ſhould not have preſumed to have aſked ſuch a Queſtion; nor did ſhe give me any Explanation at all.

Mr. Dunning. Was any Thing ever ſaid by Lord *Briſtol*, and communicated to the Lady, reſpecting an Intention of his to appeal from this Sentence?

Mr. Hawkins. I know nothing of that.

Mr. Dunning. What ſaid her Grace on that Subject?

Mr. Hawkins. Her Grace had told me, that the Sentence was paſſed, and that it was *irrevocable and final* to them Two, unleſs my Lord *Briſtol*, within a certain limited Time, did Something to keep the Cauſe open. I do not know what that was. That there was, ſhe believed, ſome Demur at that Time, as my Lord *Briſtol* was not ſatisfied with the Sentence, and had made ſome Demand by his Proctor, if I underſtood right, for the Coſts of Suit which were decreed, I believe, againſt him.

Mr. Dunning. Do you know whether the Coſts of Suit were ever paid by my Lord *Briſtol?*

Mr. Hawkins. I do not, but I believe they were. I was going on to ſay what I recollected upon that. They had ſome Demurs upon the Coſts of Suit; but that if my Lord *Briſtol* inſiſted upon it, ſhe would give her Proctor Directions not to let ſuch a Thing ſtop the Cloſing of the Suit.

Mr.

Mr. Dunning. Do you then know whether my Lord *Briſtol*, who by the Terms of the Sentence was to pay the Coſts, did not, upon this, receive the Coſts he had been put to in the Suit?

Mr. Hawkins. I know nothing more than I have mentioned: Not a Tittle more nor leſs.

Mr. Dunning. Do you know of no other Means that were uſed to ſatisfy my Lord *Briſtol*, and to prevent this Cauſe from continuing any longer open?

Mr. Hawkins No.

Mr. Dunning. Do you know nothing of any Bond, that was given from any Body to any Body, reſpecting this Cauſe and this Queſtion?

Mr. Hawkins. Not the leaſt in the World.

Mr. Dunning. Am I to underſtand, that you ſay you know nothing of any Bond that has any direct, immediate, or other Relation to this Subject?

Mr. Hawkins. Not the leaſt that ever I heard of.

Mr. Dunning. You are not then a Truſtee in any ſuch Bond?

Mr. Hawkins. Oh, no, certainly not.

Mr. Dunning. Can you give us the Date of the Time, when the Firſt Meſſage was conveyed from Lord *Briſtol* to the Lady through you?

Mr. Hawkins. I was endeavouring, before I came into the Court, to recollect it, but I could not: I put nothing down in Writing relative to it.

Mr. Dunning. Can you recollect the Year?

Mr. Hawkins. The Meſſage muſt have been immediately before the Commencement of the Suit, whenever that was.

Mr. Dunning. I preſume, though you uſed the Terms, *her Grace*, and *his Lordſhip*, you perfectly well underſtood, that neither of the Parties had a Right to theſe Appellations *at the Time* theſe Circumſtances paſſed?

Mr. Hawkins. Yes, certainly.

Mr. Dunning. Does any Circumſtance impreſs you with the Recollection of the Time of the Year, when this Converſation paſſed; if you cannot tell us the exact Year?

Mr. Hawkins. I might have inquired how long the Suit laſted; but I proteſt I do not recollect now any particular Circumſtances to bring it to my Mind.

Mr. Wallace. My Lords, I have no Queſtion on the Part of the Priſoner to put to Mr. *Hawkins.*

Duke of Ancaſter. Did you attend the Child?

Mr. Hawkins. I think Once.

Duke of Ancaſter. Was it a Boy or a Girl?

Mr. Hawkins. A Boy.

Duke of Ancaſter. Do you ſpeak from your own Knowledge that the Child is dead?

Mr. Hawkins. No; but have no Reaſons to doubt it.

Duke of Ancaſter. Do you know of your own Knowledge, that That Child was the Child of the Priſoner at the Bar?

Mr. Hawkins. No, I could have no Proof of that; for from the Time that her Grace was brought to-bed of it, I never ſaw the Child till I was ſent for to it in its Illneſs; perhaps I had hardly ever heard of it: I had never ſeen it.

Duke of Ancaſter. Did you attend the Ducheſs at the Time ſhe lay in?

Mr. Hawkins. I did not at her Lying-in: I was deſired, in caſe at any future Time it had been neceſſary, that I ſhould have been a Witneſs of the Birth of that Child.

Duke of Ancaſter. Did you underſtand that Child to be the legitimate Child of the Ducheſs of *Kingſton* and Mr. *Hervey?*

Mr. Hawkins. I did ſuppoſe ſo at that Time.

Duke of Ancaſter. Was you told ſo by any Body?

Mr. Hawkins. I could not be neceſſarily told ſo at that Time, becauſe I had been told of the Marriage before.

Duke of Grafton. Was you, from the Converſation that paſſed with the Party at that Time, convinced that it was a ſuppoſed, or that it was a real Marriage; and were any Expreſſions uſed relative to the concealing the Birth of the Child?

Mr. Hawkins. I underſtood, at that Time, that it was a real Marriage.

Duke of Grafton. Were there Expreſſions made Uſe of, that would not have been made Uſe of in any other Circumſtance?

Mr. Hawkins. I do not remember any particular Expreſſion at all, only that I was deſired to attend, with a View and Purpoſe that I might be a Witneſs to the Birth of that Child;

being, as I ſuppoſe, thought more proper, as a Phyſical Man, to be in the Room at the Time of a Delivery and the Birth of a Child than any other Perſon.

Lord Lyttelton. Who firſt informed you of the Marriage?

Mr. Hawkins. I ſhould rather apprehend it came from the Ducheſs, before I ſaw my Lord *Briſtol.*

Lord Lyttelton. Do you recollect how long that was ago?

Mr. Hawkins. I do not indeed; it was a great many Years ago.

Lord Lyttelton. Do you remember to have heard any particular Circumſtances related to you, by either of the Parties, concerning the Celebration of that Marriage?

Mr. Hawkins. No, never more than what I have mentioned juſt now.

Lord Camden. Was you in the Room at the Time of the Delivery?

Mr. Hawkins. To the beſt of my Remembrance I certainly was.

Lord Camden. Did you ever ſee the Child itſelf?

Mr. Hawkins. At the Time of the Delivery I dare ſay I did. Afterwards I never did, but when I was ſent for on purpoſe to ſee it.

Lord Camden. Had you then any certain Knowledge of its being the Priſoner's Child?

Mr. Hawkins. It is impoſſible for me to ſay when I ſaw the Child ſome Months afterwards, that I could know it to be the ſame Child.

Lord Ravenſworth. Did you not underſtand, that the Ducheſs apprehended and was convinced, that the Sentence in the Eccleſiaſtical Court was final?

Mr. Hawkins. Undoubtedly ſo.

Lord Ravenſworth. And that ſhe was at Liberty to marry again, unleſs the Sentence was appealed from within a limited Time?

Mr. Hawkins. Moſt certainly.

Lord Ravenſworth. Who delivered the Priſoner?

Mr. Hawkins. I was endeavoring to recollect before I came, who was preſent beſides myſelf, and who delivered her Grace; but I proteſt I have forgotten it, ſo as not to recollect. I could not recollect, it is ſo long ago.

Ordered to withdraw.

The Honourable SOPHIA CHARLOTTE FETTIPLACE *ſworn.*

Mr. Attorney General. How long have you been acquainted with the Priſoner at the Bar?

Mrs. Fettiplace. A great many Years.

Mr. Attorney General. Did you know the Lady before the Year 1744?

Mrs. Fettiplace. My Lords, I have no other Knowledge of any of the Circumſtances to be inquired after, than what ariſes from my Connexion formerly with the Lady; and unleſs your Lordſhips require it of me as a Witneſs for Juſtice, I ſhould wiſh to be excuſed.

Lord High Steward. The Lady muſt certainly diſcloſe what ſhe knows for the Purpoſes of Juſtice.

Mr. Attorney General. Did you know the Priſoner at the Bar *before* the Year 1744?

Mrs. Fettiplace. I cannot recollect.

Mr. Attorney General. Did you know the Priſoner *before* ſhe was Maid of Honour to the late Princeſs of *Wales.*

Mrs. Fettiplace. No, I did not.

Mr. Attorney General. What Converſation have you ever had with the Priſoner relative to her Marriage with Mr. *Hervey?*

Mrs. Fettiplace. I believe I have heard her ſay, that ſhe was married to him.

Mr. Attorney General. Can you recollect what Circumſtances ſhe has mentioned reſpecting that Marriage, where, and at what Time, and before what Witneſſes?

Mrs. Fettiplace. In *Hampſhire*, in a Summer-houſe, in a Garden.

Mr. Attorney General. Can you recollect upon what Occaſions theſe Converſations have paſſed between you and the Priſoner?

Mrs. Fettiplace. Upon my Word I cannot pretend to ſay that: It is long ago.

Mr. Attorney General. Do you recollect any Converſation reſpecting the Child, which the Priſoner had by Mr. *Hervey?*

Mrs.

Mrs. Fettiplace. I know nothing about it.

Mr. Attorney General. Can you recollect, how often in Converſation it has been ſaid between the Priſoner and you, that ſhe was married to Mr. *Hervey?*

Mrs. Fettiplace. I believe but Once.

Mr. Attorney General. My Lords, I ſhall not trouble Mrs. *Fettiplace* with any more Queſtions.

Lord High Steward. Would the Counſel for the Priſoner aſk the Witneſs any Queſtions?

Mr. Wallace. My Lords, I ſhall not aſk Mrs. *Fettiplace* any Queſtions.

Mr. Solicitor General. My Lords, I would now call Lord *Barrington.*

Lord BARRINGTON, *who was in like Manner ſworn.*

Mr. Solicitor General. How long have you been acquainted with the Lady at the Bar?

Lord Barrington. Above Thirty Years.

Mr. Solicitor General. Did you ever hear from the Lady at the Bar, that ſhe was married to Mr. *Hervey?*

Lord Barrington. My Lords, I am come here in Obedience to your Lordſhips Summons, ready to give Teſtimony, as to any Matter that I know of my own Knowledge, or that has come to me in the uſual Way; but if any Thing has been confided to my Honour, or confidentially told me, I do hold, with humble Submiſſion to your Lordſhips, that as a Man of Honour, as a Man regardful of the Laws of Society, I cannot reveal it.

Lord High Steward. When the laſt Witneſs but one (Mr. *Hawkins)* was at the Bar, he made ſomething like the ſame Excuſe for his not anſwering the Queſtions put to him. He was then informed by a noble and learned Lord, and the whole Court agreed with that Lord, that ſuch Queſtions were to be anſwered in a Court of Juſtice.

Lord Barrington. I have no Doubt, but that the Queſtion is a proper Queſtion to be aſked by a Court of Juſtice, otherwiſe your Lordſhips would not have permitted it to be aſked. But, my Lords, I think every Man muſt act from his own Feelings; and I feel, that any private Converſation intruſted to me, is not to be reported again.

A Lord. His Lordſhip will recollect the Oath that he has taken, is, that he ſhall declare the *whole* Truth.

Lord Barrington. My Lords, As I underſtand the Oath, I can decline anſwering the Queſtion that has been aſked me without acting contrary to that Oath, without being guilty of Perjury. But, if it is the Opinion of your Lordſhips, that I am bound by that Oath to anſwer, and that I ſhall be guilty of a Perjury if I do not anſwer, in that Caſe, my Lords, I ſhall think differently, for I will not be perjured.

Ducheſs of Kingſton. I do releaſe my Lord *Barrington* from every Obligation of Honour. I wiſh, and earneſtly deſire, that every Witneſs, who ſhall be examined, may deliver their Opinions in every Point juſtly, whether for me or againſt me. I came from *Rome* at the Hazard of my Life to ſurrender myſelf to this Court; I bow with ſubmiſſive Obedience to every Decree, and do not even complain, that an Eccleſiaſtical Sentence has been deemed of no Force, although ſuch a Sentence has never been controverted during the Space of One thouſand Four hundred and Seventy-five Years.

Lord Barrington. My Lords, I do ſolemnly declare to your Lordſhips, on that Oath that I have taken, and on my Honour, that I have not had the leaſt Communication made to me of the Ducheſs of *Kingſton*'s Generoſity. I have not had the leaſt Communication with her Grace by Letter, Meſſage, or in any other Way, for more than Two Months; and I had no Idea of being ſummoned as a Witneſs here, until the *Eaſter* Holy-days, ſo that her Grace's Generoſity is entirely ſpontaneous, and of her own Accord. But, my Lords, I have a Doubt, which no Man can reſolve better than your Lordſhips, becauſe your Honour is as high as any Men. I have a Doubt, whether, thinking it improper that I ſhould betray confidential Communications before the Ducheſs conſented that I ſhould, and gave me my Liberty; whether her Grace's Generoſity ought not to tie me more firmly to my former Reſolutions?

Duke of Richmond. For one, I think that it would be improper in the noble Lord to betray any private Converſations. I ſubmit to your Lordſhips, that every Matter of Fact, not of Converſation, which can be requeſted, the noble Lord is bound to diſcloſe.

Lord Mansfield. I mean only to propoſe to your Lordſhips, to avoid adjourning to conſider this Queſtion or any Thing further upon it at preſent, that the Counſel might be allowed to call other Witneſſes in the mean Time, and that Lord *Barrington* may have an Opportunity

Opportunity of conſidering of the Matter, if the Counſel ſhould think proper to call his Lordſhip again.——[*This Propoſal was over-ruled.*]

The Counſel againſt the Ducheſs deſired to withdraw the Witneſs.

Lord Camden. My Lords, I underſtand from the Bar, that rather than your Lordſhips ſhould be perplexed with any Queſtion, which may ariſe upon the noble Lord's Difficulty in giving his Evidence at the Bar, the Counſel would rather wave the Benefit of his Evidence in the Cauſe. My Lords, if that be their Reſolution, and they think, that ſafely and without Prejudice to this Proſecution they may venture to give up that Evidence, your Lordſhips, to be ſure, will acknowledge the Politeneſs of the Surrender. But, my Lords, now I am upon my Legs, you will give me Leave to make one ſhort Remark on this Proceeding, and to hope that your Lordſhips, ſiting in Judgment on Criminal Caſes, the higheſt and moſt important, that may affect the Lives, Liberties, and Properties of your Lordſhips; that you ſhall not think it befitting the Dignity of this High Court of Juſtice to be debating the *Etiquette* of Honour, at the ſame Time, when we are trying Lives and Liberties. My Lords, the Laws of the Land, I ſpeak it boldly in this grave Aſſembly, are to receive another Anſwer from thoſe, who are called to depoſe at your Bar, than to be told that in Point of Honour and of Conſcience they do not think, that they acquit themſelves like Perſons of that Deſcription, when they declare what they know. There is no Power of Torture in this Kingdom to wreſt Evidence from a Man's Breaſt, who withholds it; every Witneſs may undoubtedly venture on the Puniſhment, that will enſue on his refuſing to give Teſtimony. As to caſuiſtical Points, how far he ſhould conceal or ſuppreſs that, which the Juſtice of his Country calls upon him to reveal, that I muſt leave to the Witneſs's own Conſcience.

Lord Lyttelton. The Laws of the Land have ſpoken clearly on this Occaſion, and if your Lordſhips had applied them to the noble Lord at the Bar, he has told your Lordſhips that he is willing to ſubmit to your Judgment. But, my Lords, it is yet a Queſtion, whether or not the noble Lord will be perjured? It is a Queſtion not decided by your Lordſhips, that he will be perjured, if he refuſes to betray a Confidence. I am ſure that I feel, and I apprehend your Lordſhips as Men of Honour feel, the full Weight of the noble Lord's Objection; he will ſpeak to Matters of Fact, but he does not deſire to ſpeak merely to Converſation; and, my Lords, I am not ſurprized that he ſhould make that Objection, for if you conſider how looſe and inaccurate all Evidence of Converſation muſt be, it takes off in a Court of Juſtice much from its Availment. The noble Lord has told you, that confidential Converſation may have paſſed between him and the noble Lady at the Bar: He has ſtated to you his Doubts, and I apprehend he is not obliged to go on with his Evidence, until your Lordſhips have unanimouſly pronounced, that it is your Opinion that he is obliged ſo to do.

Lord High Steward. If the Counſel for the Proſecution ſay, that they have no Queſtions to aſk the noble Lord, he may withdraw.

Lord Barrington. My Lords, Might I be allowed to ſay a Word or two, before I withdraw from this Bar! It is impoſſible that any Perſon can revere this High Court, indeed any Court of Juſtice in this Country, more than I do. It is not, my Lords, from Contumacy, of which I am incapable: It is not with any View or Purpoſe that any of your Lordſhips would diſapprove, as Individuals, I am certain, that I have taken the Part which I have done. I do not ſay, that there are no Caſes, in which a Perſon ought not to reveal private Converſation. There are Caſes, in my Opinion, in which he ſhould. There are Caſes, in my Opinion, in which he ſhould not: And, my Lords, no Perſon can draw the Line but himſelf. But, my Lords, I have recollected (I am obliged to the Counſel for the Proſecution, who are willing to admit me to withdraw. I return them my Thanks. I dare ſay in that they have conſulted my Feelings as much as they could, conſiſtent with the Duties of their Station) but I have recollected, my Lords, ſince the generous Manner in which the Ducheſs of *Kingſton* has been pleaſed to abſolve me from all Ties, I have recollected, that ſhe ſaid, ſhe wiſhed and deſired that I might ſay any Thing. If her Grace thinks that any Thing I can ſay, conſiſtent with Truth, can tend to her Juſtification, I am then ready to be examined to private Communications.

Mr. Solicitor General. I do not deſire to examine the noble Lord. I ſtated to your Lordſhips, that I do not think the Cauſe, in which my Duty engages me, will at all ſuffer by having Deference to any Difficulty that the noble Lord may entertain. I will not examine the noble Lord on the Conceſſion of the Lady at the Bar. The noble Lord ſtands at your

Lordſhips Bar a Witneſs. Having taken the Oath, though I do not examine him, the Priſoner may.

Mr. Wallace. At the ſame Time that I expreſs my Aſtoniſhment at the Offer, Lord *Barrington* is not called to the Bar as a Witneſs for the Priſoner. The noble Lady at the Bar has her Witneſſes, in her Turn, to call, with which ſhe ſhall trouble your Lordſhips.

Duke of Richmond. I do not look on a Witneſs at the Bar to be the Witneſs of the Counſel, or of the Priſoner; but the Witneſs of the Houſe. I ſhall, therefore, aſk a Queſtion or Two of the noble Lord. I will not diſtreſs the noble Lord's Feelings by inquiring into confidential Matters. I will merely aſk Queſtions of Fact. The Firſt Queſtion I would aſk the noble Lord is, Whether he knows any Fact by which he is convinced that Mr. *Hervey* was married to Miſs *Chudleigh?*

Lord Barrington. I do not know of any Fact, which will prove the Marriage between the Ducheſs of *Kingſton* and Mr. *Hervey*, of my own Knowledge.

Duke of Richmond. The noble Lord muſt leave it to the Houſe to judge whether it will or not. But does his Lordſhip know any Fact relative to that Matter?

Lord Barrington. I do not know any Thing of my own Knowledge that can tend to prove that Marriage. I know nothing but what I have heard in the World, and from Converſation.

Lord Radnor. I am afraid your Lordſhips, by your Acquieſcence, have admitted a Rule of Proceeding here, which would not be admitted in any inferior Court in the Kingdom. I deſire, therefore, to aſk the noble Lord, Whether he knows any Matter of Fact relative to that Marriage?

Lord Barrington. My Lords, If I do, I cannot reveal it; nor can I anſwer the Queſtion without betraying private Converſation.

Moved to adjourn. Adjourned to the Chamber of Parliament.

After an Adjournment of ſome Time, the Lords returned to Weſtminſter-Hall.

Lord High Steward. My Lord Viſcount *Barrington*, I am commanded by the Lords to acquaint your Lordſhip, that it is the Judgement of this Houſe, that you are bound by Law to anſwer all ſuch Queſtions as ſhall be put to you.—Has the Counſel for the Proſecution any Queſtion to put to the Witneſs at the Bar?

Mr. Solicitor General. We ſhall not aſk the noble Lord any Queſtions.

Lord High Steward. Has the Counſel for the Priſoner any Queſtion to put to the Witneſs at the Bar?

Mr. Wallace. Not any.

Lord Radnor. Does the Witneſs know from Converſation with the Lady at the Bar, that ſhe was married to the Earl of *Briſtol?*

Lord Barrington. My Lords, I have already told your Lordſhips the Motives which induce me to think that I cannot, conſiſtent with Conſcience, with Honour, or with Probity, anſwer ſuch Queſtions, as will tend to diſcloſe confidential Communications made to me. At the ſame Time I informed your Lordſhips, that if the Oath went ſo far as that I ſhould break that Oath, if I did not anſwer all Queſtions which could be put to me; if that was the Determination of your Lordſhips, I ſaid I would not break my Oath. My Lords, I continue in the ſame Opinion and Principle. My own Judgment, as far as it guides me, which is very imperfectly, does tell me, that I am not obliged to anſwer all Queſtions that can be put to me. But, my Lords, though nobody can draw the Line of Conſcience, of Honour, and of Probity in this Caſe but myſelf, yet in Point of Law, and in Interpretation of Law, and the Oath I have taken, I am deſirous of Aſſiſtance from thoſe who can beſt give it me, and I had much rather truſt almoſt any Man's Judgment than my own. I do not dare to aſk again your Lordſhips Opinion on that Point. But, my Lords, might I be permitted to apply to the learned Counſel who are near me; if it is the Opinion of the learned Counſel, that I am obliged by my Oath to anſwer the noble Lord's Queſtion, I will readily anſwer it.

Lord Effingham. I apprehend, that no Queſtion can be put in this Court on a Matter of Law to the Counſel at the Bar.

Several Lords ſaid, "You may aſk the Counſel."

Lord Barrington. My Lords, I have put the Queſtion to the Attorney General, and I give him my Thanks. He ſays, he thinks I am obliged by my Oath to anſwer all Queſtions. That being the Caſe, I have nothing more to ſay, than humbly to beg your Lordſhips Pardon for having given you ſo much Trouble, and to beg and entreat that you will believe, that nothing but the tendereſt and the ſtrongeſt Feelings, and the moſt determined Reſolution to do what was Right in my Situation, could have induced me to give you ſo much Trouble.

Lord Radnor. Whether his Lordſhip knows from Converſation with the Lady at the Bar, that ſhe was married to the Earl of *Briſtol?*

Lord Barrington. My Memory I have found by long Experience to be a very erroneous one, and eſpecially with relation to Things paſt long ago. To the beſt of my Memory and Belief, the Ducheſs has never honored me with any Converſation on the Subject for many, many Years paſt; I believe I might ſay for above Twenty Years paſt: And, my Lords, that being the Caſe, I muſt anſwer that Queſtion very doubtfully; but after the Solution which the learned Counſel has given to my Doubts, I mean not to conceal any Thing from your Lordſhips. Thinking it right to be examined, I think it right to give frank Anſwers, and any Doubt in any Thing I ſay will ariſe from my not remembering well the Circumſtances. The Ducheſs of *Kingſton* many (I ſhould not ſay too much if I was to ſay Thirty Years ago) did entruſt me with a Circumſtance in her Life, relative to an Engagement of a Matrimonial Kind with the Earl of *Briſtol*, then Mr. *Hervey*.

Lord Radnor. Whether his Lordſhip underſtood, that that Matrimonial Engagement, which had already paſſed, was a Marriage?

Lord Barrington. I underſtood, there had been a Matrimonial Engagement entered into, but whether it amounted to a legal Marriage or not, I am not Lawyer or Civilian enough to judge.

Lord Radnor. Did his Lordſhip ever underſtand, that there was Iſſue of that Marriage?

Lord Barrington. Upon my Word I cannot ſay; I do not know that the Ducheſs ever made any Communication of that Sort to me. I had heard of it in the World, but I do not know, that the Ducheſs ever communicated to me the Circumſtance of her having had any Iſſue.

Lord Radnor. Does his Lordſhip know any Thing of a Bond entered into on the Part of the Priſoner at the Bar, of late Years, relative to the Suppreſſion of Evidence, or the Payment of Coſts of Suit in the Eccleſiaſtical Court?

Lord Barrington. I never had the leaſt Communication from the Ducheſs of *Kingſton*, or from any Perſon relative to any Thing of the Kind; I do not recollect that I ever heard of any ſuch Thing even in the World; and the Ducheſs of *Kingſton* has never communicated to me, in the Courſe of her Life, to the beſt of my Memory or Belief, any Thing which was, at the Time ſhe was pleaſed to communicate it to me, in the leaſt a Deviation from the ſtricteſt Rules of Virtue and Religion.

Ordered to withdraw.

My Lords, Is it too much to beg, that what I have ſaid at the Bar may be read over to me? Part of it is of a nice Nature; I may have expreſſed myſelf improperly; the Writer may have taken it down erroneouſly; I ſhould be glad to have it read over to me, that I may correct it in your Lordſhips Preſence.

Here the univerſal Voice was "Read! Read!" *but Lord* Barrington *ſpared the Houſe the Trouble, by addreſſing himſelf to their Lordſhips as follows:*

My Lords, I find by the Clerk, that the Part which is of the niceſt Kind with relation to me, wherein I expreſſed the Difficulties and Feelings I had on the Subject of Queſtions that I thought I ought not to anſwer, and why and on what Ground I have ſince thought it my Duty, underſtanding that my Oath obliges me to it, to give my Anſwers; I find, my Lords, that Part has not been taken down by the Clerk, and therefore I ſhall give your Lordſhips no further Trouble.

Mr. Dunning. My Lords, we deſire next to produce

Mrs. JUDITH PHILLIPS, *who was ſworn in like Manner.*

Mr. Dunning. You was the Widow of Mr. *Amis*, was you not?
Mrs. Phillips. Yes.
Mr. Dunning. Mr. *Amis* was Parſon of the Pariſh of *Lainſton* in *Hampſhire?*
Mrs. Phillips. Yes.

Mr.

Mr. Dunning. Did you know a Family of the Name of *Merrill?*

Mrs. Phillips. I did.

Mr. Dunning. Was, or was not, Mr. *Merrill*'s Houſe in that Pariſh?

Mrs. Phillips. It was.

Mr. Dunning. How long ſince did your Huſband die?

Mrs. Phillips. Seventeen Years ago.

Mr. Dunning. Do you know the Lady at the Bar?

Mrs. Phillips. Very well.

Mr. Dunning. How long have you known the Lady at the Bar?

Mrs. Phillips. About Thirty Years.

Mr. Dunning. Was you privy to her Marriage in your Huſband's Life-time?

Mrs. Phillips. I was not at the Wedding; but I heard my Huſband ſay, he married them.

A Lord. That is not Evidence.

Mr. Dunning. Had you not any other Means of knowing that Fact from the Lady at the Bar herſelf?

Mrs. Phillips. Yes.

Mr. Dunning. Do you remember the Lady at the Bar coming to *Wincheſter?*

Mrs. Phillips. Very well.

Mr. Dunning. When?

Mrs. Phillips. She came about the Middle of *February*, 1759.

Mr. Dunning. Was that in your Huſband's Life-time, or ſince his Death?

Mrs. Phillips. In my Huſband's Life-time.

Mr. Dunning. Was it long before, and how long before Mr. *Amis*'s Death?

Mrs. Phillips. Six Weeks.

Mr. Dunning. What was the Occaſion of the Lady's Viſit to *Wincheſter?*

Mrs. Phillips. For a Regiſter of her Marriage.

Mr. Dunning. If you recollect any Particulars of what paſſed upon that Occaſion, ſtate them.

Mrs. Phillips. She came to the *Blue Boar* in *Kingſgate-ſtreet*, *Wincheſter*, and ſent for me by Six o'Clock in the Morning. When I went to her, ſhe aſked me if I thought Mr. *Amis* would give her a Regiſter of her Marriage? I told her, I thought he would. Then I aſked her to my Houſe, and when ſhe came, ſhe aſked me to go up with her to Mr. *Amis*, and aſk if he would ſee her and give her a Regiſter of her Marriage? I went up to Mr. *Amis*, and told Mr. *Amis* what the Lady had deſired. Mr. *Amis* deſired to ſee the Lady. Then I came down and told her, that Mr. *Amis* at that Time was confined to his Bed; the Lady went to Mr. *Amis*, and told Mr. *Amis* her Requeſt. Then Mr. *Merrill* and the Lady conſulted together whom to ſend for, and they deſired me to ſend for Mr. *Spearing* the Attorney. I did ſend for him; and during the Time the Meſſenger was gone, the Lady concealed herſelf in a Cloſet; ſhe ſaid, ſhe did not care that Mr. *Spearing* ſhould know that ſhe was there. When Mr. *Spearing* came, Mr. *Merrill* produced a Sheet of Stamped Paper, that he brought to make the Regiſter upon; Mr. *Spearing* ſaid, it would not do, it muſt be a Book, and that the Lady muſt be at the making of it. Then I went to the Cloſet, and told the Lady; then the Lady came to Mr. *Spearing*, and Mr. *Spearing* told the Lady a Sheet of Stamped Paper would not do, it muſt be a Book. Then the Lady deſired Mr. *Spearing* to go and buy one. Mr. *Spearing* went and bought one, and, when brought, the Regiſter was made. Then Mr. *Amis* delivered it to the Lady; the Lady thanked him, and ſaid it might be an Hundred thouſand Pounds in her Way; at the ſame Time ſhe added, that ſhe had had a Child by Mr. *Hervey*, and that it was a Boy, but that it was dead; and that ſhe had borrowed an Hundred Pounds of her Aunt *Hanmer* to buy Baby Things. Before Mr. *Merrill* and the Lady left my Houſe, the Lady ſealed up the Regiſter, and gave it to me, and deſired I would take Care of it until Mr. *Amis*'s Death, and then deliver it to Mr. *Merrill*.

Mr. Dunning. Did it accordingly remain in your Hands until your Huſband's Death, and then deliver it to Mr. *Merrill?*

Mrs. Phillips. I did.

Mr. Dunning. Do you recollect, whether Mr. *Merrill* accompanied the Lady from the Time you firſt ſaw her in *Wincheſter* to your Huſband's Houſe, or did Mr. *Merrill* join them afterwards when they were there?

Mrs. Phillips. He joined them afterwards.

Mr. Dunning. Do you remember, whether any other Entry was then made in this Regiſter-book, beſides the Entry of this Marriage?

Mr.

Mrs. Phillips. I don't remember any.

Mr. Dunning. Do you recollect to have ſeen any Thing of the Lady at the Bar ſince your Huſband's Death?

Mrs. Phillips. Many Times.

Mr. Dunning. Do you recollect any Converſation, that has paſſed between you at any of thoſe Times?

Mrs. Phillips. After I had delivered the Regiſter to Mr. *Merrill*, I waited upon the Lady at her Houſe at *Knightſbridge*, and found her in the Garden. I told her, I had delivered the Regiſter to Mr. *Merrill*; ſhe thanked me for it; and deſired I would take no Notice of it; at the ſame Time ſhe ſaid Mr. *Swino* was in the Garden, and hoped I would take no Notice to him of the Affair.

Mr. Dunning. Do you recollect any further Converſation about this Book, after Mr. *Merrill*'s Death, with the Lady?

Mrs. Phillips. I was once a fiſhing with the Lady, and ſhe told me ſome Things that had paſſed in the Family. She told me, that Mrs. *Bathurſt* had uſed her very ill, for ſhe had got all the Papers Mr. *Merrill* had of hers at the Time of his Death. Upon which I aſked her, what was become of the Regiſter? She told me the Miniſter of the Pariſh had it.

Mr. Dunning. Was, or was not, the Mrs. *Bathurſt* you have ſpoken of, the Daughter of that Mr. *Merrill?*

Mrs. Phillips. She was.

Mr. Dunning. Do you recollect any other Converſation with the Lady at the Bar, after her Marriage with the Duke of *Kingſton?*

Mrs. Phillips. Yes; I waited upon her in *Arlington-ſtreet*, after her Marriage with the Duke of *Kingſton*. She ſaid to me, Was it not very good-natured of the Duke to marry an old Maid? I looked her in the Face and ſmiled, but ſaid nothing then. She aſked me, if Mr. *Hervey* had ſent to me at the Time of her Trial? I ſaid he had not ſent to me.

(The Book ſhewn to the Witneſs.)

Mr. Dunning. Can you be ſure, whether that is the Book you have been ſpeaking of?

Mrs. Phillips. I am very ſure.

Mr. Dunning. I believe there are the Veſtiges of the Seals about it ſtill?

Mrs. Phillips. There are.

Mr. Dunning. Where it was ſealed up?

Mrs. Phillips. Yes.

Mr. Dunning. Look at the Entries in the Book; are they not your Huſband's Writing? and were they not made in your Preſence?

Mrs. Phillips. They are my Huſband's Hand-writing, and they were made in my Preſence.

Mr. Dunning. They were made likewiſe in the Preſence of the Lady at the Bar, were they not?

Mrs. Phillips. They were.

(Clerk reads.)

" *Marriages, Births, and Burials in the Pariſh of* Lainſton. 2*d of* Auguſt, *Mrs.* Suſannah " Merrill, *Relict of* John Merrill, *Eſq; buried.* 4*th of* Auguſt 1744, *Married the* " *Honourable* Auguſtus Hervey, *Eſq; in the Pariſh Church of* Lainſton, *to Miſs* Elizabeth " Chudleigh, *Daughter of Colonel* Thomas Chudleigh, *late of* Chelſea College, *deceaſed.* " *By me* Thomas Amis."

Mr. Dunning. My Lords, I have done with this Witneſs.

Lord High Steward. Would the Counſel for the Priſoner aſk this Witneſs any Queſtions?

Mr. Mansfield. I ſhould be glad firſt to ſee the Book.——I would wiſh to know by what Means you now ſubſiſt? what Support you have?

Mrs. Phillips. Upon my own private Fortune.

Mr. Mansfield. Where do you live?

Mrs. Phillips. At *Briſtol.*

Mr. Mansfield. Is your Huſband living or dead?

Mrs. Phillips. Alive.

Mr. Mansfield. What Employment was he in, before he lived at *Briſtol* upon his Fortune?

Mrs. Phillips. He was Steward to the Duke of *Kingſton*, and a Graſier.
Mr. Mansfield. Was he not turned out of the Service of the Duke of *Kingſton?*
Mrs. Phillips. I believe he was not turned out.
Mr. Mansfield. Do not you know, whether he was or not?
Mrs. Phillips. He wrote a Letter to the Duke, and deſired to leave him.
Mr. Mansfield. Do you know then, that he was not turned out?
Mrs. Phillips. Yes.
Mr. Mansfield. Had he been threatened to be turned out, before he ſent that Letter?
Mrs. Phillips. Not that ever I heard of.
Mr. Mansfield. Had your Huſband had any Differences or Diſputes with the Duke of *Kingſton?*
Mrs. Phillips. No, not that I know.
Mr. Mansfield. Was his Reaſon then for quitting the Service of the Duke of *Kingſton* merely his own Inclination, without any particular Reaſon or Cauſe?
Mrs. Phillips. He thought the Duke looked cool upon him: For what Reaſon he could not tell.
Mr. Mansfield. Had the Duke ever expreſſed any Cauſe of Diſlike to him?
Mrs. Phillips. Not that I know of.
Mr. Mansfield. How long have you left *Briſtol?*
Mrs. Phillips. About Four Months.
Mr. Mansfield. Where have you lived?
Mrs. Phillips. Sometimes in one Place, ſometimes in another.
Mr. Mansfield. In what Places.
Mrs. Phillips. Sometimes at the *Turf Coffee-houſe*, ſometimes in *St. Mary Axe.*
Mr. Mansfield. How much of the Time at the *Turf Coffee-houſe?*
Mrs. Phillips. I really cannot ſay exactly.
Mr. Mansfield. Your are not aſked as to a Week. Have you lived there the greater Part?
Mrs. Phillips. The greater Part.
Mr. Mansfield. Who has ſupported you at the *Turf Coffee-houſe?*
Mrs. Phillips. Ourſelves.
Mr. Mansfield. Have you paid the Expences of your Support there?
Mrs. Phillips. That I do not know any Thing of.
Mr. Mansfield. Do you not know, that the Whole of your Expence at the *Turf Coffee-houſe* is to be defrayed by the Proſecutor, Mr. *Evelyn Meadows?*
Mrs. Phillips. I do not know it is.
Mr. Mansfield. Have you not underſtood ſo?
Mrs. Phillips. I have not.
Mr. Mansfield. Nor do you believe it?
Mrs. Phillips. I cannot tell what to believe, or what is to be done.
Mr. Mansfield. Cannot you tell, whether you believe that your Expences at the *Turf Coffee-houſe* are to be defrayed by Mr. *Meadows?*
Mrs. Phillips. No, I do not. I do not know any Thing of that.
Mr. Mansfield. Do you not know, by whom you expect the Expence of your Support at the *Turf Coffee houſe* is to be paid?
Mrs. Phillips. I do not know by whom it is to be paid.
Mr. Mansfield. Have you ſeen Mr. *Evelyn Meadows* at the *Turf Coffee-houſe?*
Mrs. Phillips. I have.
Mr. Mansfield. How often may you have ſeen that Gentleman there?
Mrs. Phillips. I cannot tell.
Mr. Mansfield. Many Times, or only Once or Twice?
Mrs. Phillips. I may have ſeen him Twice or Three Times.
Mr. Mansfield. Have you not ſeen him oftener than that, there?
Mrs. Phillips. I have ſeen him frequently in the Yard.
Mr. Mansfield. Have you not had frequent Converſations with him?
Mrs. Phillips. Not frequent.
Mr. Mansfield. Have you not converſed with him ſometimes at the *Turf Coffee houſe*, ſometimes at other Places.
Mrs. Phillips. No where, but at the *Turf Coffee-houſe.*
Mr. Mansfield. Who has been preſent at ſuch Converſations?
Mrs. Phillips. My Huſband.

Mr. Mansfield. Who elſe?
Mrs. Phillips. No one elſe.
Mr. Mansfield. Has not Mr. *Fozard* been preſent at ſome of theſe Converſations?
Mrs. Phillips. Never.
Mr. Mansfield. Have you not been at Mr. *Fozard*'s Houſe with Mr. *Meadows?*
Mrs. Phillips. Never; by Accident on *Chriſtmas Day* I called at his Door, and he was there.
Mr. Mansfield. Was you in Company with Mr. *Meadows* at Mr. *Fozard*'s?
Mrs. Phillips. I was.
Mr. Mansfield. Does Mr. *Fozard* aſſiſt Mr. *Meadows* in the Courſe of this Proſecution?
Mrs. Phillips. I know nothing of that.
Mr. Mansfield. Do not you know, that Mr. *Fozard* has aſſiſted Mr. *Meadows* in looking out for Witneſſes?
Mrs. Phillips. I don't know any Thing about it.
Mr. Mansfield. Have you not yourſelf been preſent at Converſations with Mr. *Fozard* about this Proſecution?
Mrs. Phillips. Nothing, but what was merely accidental.
Mr. Mansfield. How often has that *Accident* happened, that you have been preſent at Converſations with Mr. *Fozard* about this Proſecution?
Mrs. Phillips. I never was at Mr. *Fozard*'s, but Twice.
Mr. Mansfield. Has Mr. *Fozard* been at the *Turf Coffee-houſe* with you?
Mrs. Phillips. He came to ſee Mr. *Phillips*, when he had the Gout.
Mr. Mansfield. How often might Mr. *Fozard* viſit you at the *Turf Coffee-houſe?*
Mrs. Phillips. He came to ſee Mr. *Phillips*, but not me.
Mr. Mansfield. How often might he viſit Mr. *Phillips* there?
Mrs. Phillips. About Three Times.
Mr. Mansfield. Have you ever met Mr. *Fozard* at any other Places beſides the *Turf Coffee-houſe* and his own Houſe?
Mrs. Phillips. Never.
Mr. Mansfield. Do you know of any Promiſe made to you or your Huſband of any Benefit or Advantage depending upon the Event of this Proſecution?
Mrs. Phillips. None in the World.
Mr. Mansfield. Did you never hear of any ſuch Promiſe being made to you or your Huſband?
Mrs. Phillips. Never.
Mr. Mansfield. Have you never ſaid, that any ſuch Promiſe or Offer was made?
Mrs. Phillips. Never, nor it never was.
Mr. Mansfield. Have you never ſaid any Thing to that Purpoſe?
Mrs. Phillips. No, never to any Body.
Mr. Mansfield. Have you never made any Mention of any Kind of Benefit or Advantage you was to receive from the Evidence you ſhould give on this Proſecution?
Mrs. Phillips. Not in the leaſt; I don't want it, nor wiſh it.
Mr. Mansfield. Did I underſtand you right, when you ſaid, that at the Time of the Entry of the Marriage in this Regiſter no other Entry was made?
Mrs. Phillips. I don't remember that; I remember very well ſtanding at the Bed's Feet when the Regiſter was made.
Mr. Mansfield. Do not you know whether any other Entry was made at that Time?
Mrs. Phillips. I don't, for I was backwards and forwards in the Room.
Mr. Mansfield. How come you then to know, that the Regiſter of this Marriage was made in the Book at that Time?
Mrs. Phillips. I ſaw it.
Mr. Mansfield. Did you read it at that Time?
Mrs. Phillips. I heard Mr. *Amis* read it.
Mr. Mansfield. Did you hear him read any Thing elſe beſides the Entry of the Marriage?
Mrs. Phillips. Nothing but that, for I was going backwards and forwards in the Room.
Mr. Mansfield. Do you know nothing at all, whether any Thing elſe was entered beſides that at the Time of the Marriage?
Mrs. Phillips. I did not ſee any Thing but that, though it might, as I was going backwards and forwards.
Mr. Mansfield. Did you ſee the Entry of the Marriage in the Book?
Mrs. Phillips. I did.

Mr.

Mr. Mansfield. If you ſaw that, muſt not you have ſeen whether there were any other Entries made on the ſame Leaf?

Mrs. Phillips. I heard it read; I never ſaw it afterwards, but when the Lady ſealed it up.

Mr. Mansfield. Did not you take Notice that there were other Entries?

Mrs. Phillips. I did not.

Mr. Mansfield. You took Notice of nothing upon the Paper but the Entry of this Marriage?

Mrs. Phillips. Of nothing elſe.

Mr. Mansfield. Did you keep the Paper long enough before you, or did the Lady at the Bar keep the Book long enough before her, for her to ſee, whether what ſhe heard read was written on the Paper?

Mrs. Phillips. She held it in this Manner *(deſcribing the Manner)* open, and I ſaw it as I ſtood by her: I did not read it, but heard it read.

Mr. Mansfield. Did all the Perſons, who were preſent, hear what was ſaid about the Hundred Pounds lent by Mrs. *Hanmer?*

Mrs. Phillips. No, they did not; the Lady ſaid ſhe had borrowed an Hundred Pounds of her Aunt *Hanmer* to buy Baby Things.

Mr. Mansfield. Who did the Lady tell that to?

Mrs. Phillips. To Mr. *Amis* and to me.

Mr. Mansfield. Did ſhe ſpeak it loudly or ſoftly, or how?

Mrs. Phillips. She ſpoke it as ſhe was ſitting by the Bedſide talking to Mr. *Amis.*

Mr. Mansfield. When did you tell any Body of ſuch Regiſter?

Mrs. Phillips. I really cannot ſay exactly when, but I have ſaid, I had it in my Poſſeſſion.

Mr. Mansfield. When did you firſt mention it?

Mrs. Phillips. I cannot tell.

Mr. Mansfield. Was Mr. *Merrill* preſent at the Time when this Entry was made in the Regiſter?

Mrs. Phillips. He was.

Mr. Mansfield. Was he in the Room the whole Time that this Converſation paſſed, that you have mentioned, of lending an Hundred Pounds by Mrs. *Hanmer?*

Mrs. Phillips. No, he was not.

Mr. Mansfield. Did Mr. *Merrill* come with the Lady, or the Lady before him, or without him?

Mrs. Phillips. The Lady before him, for Mr. *Merrill* was gone to *Lainſton* to his Seat.

Mr. Mansfield. When Mr. *Merrill* came, did not the Lady repeat the Converſation, that had been about the Child and the Hundred Pounds?

Mrs. Phillips. There was nothing of that ſaid before Mr. *Merrill.*

Mr. Mansfield. Was any Thing ſaid about making any other Entry in the Regiſter, beſides that of the Marriage?

Mrs. Phillips. Nothing that I heard.

Mr. Mansfield. When did Mr. *Merrill* come into the Room, before the Entry was made in the Book, or after?

Mrs. Phillips. Before.

Mr. Mansfield. Was Mr. *Merrill* in the Room at the Time that it was made?

Mrs. Phillips. He was.

Mr. Mansfield. Who was it brought the Stamp Paper?

Mrs. Phillips. Mr. *Merrill.*

Mr. Mansfield. Was Mr. *Merrill* in the Room when the Lady concealed herſelf, as you have ſaid?

Mrs. Phillips. He was.

Mr. Mansfield. Who elſe was in the Room?

Mrs. Phillips. No one except myſelf.

Mr. Mansfield. Now look at the Book.

Mrs. Phillips. I know the Hand perfectly well.

Mr. Mansfield. Is the Whole of that, which is written on that Leaf, the Writing of her Huſband?

Mrs. Phillips. It is.

Mr. Mansfield. You have ſaid that you went to *Arlington ſtreet*, can you name any Perſon that you ſaw there?

Mrs. Phillips. No one was in the Room, when I went, except the Lady.
Mr. Mansfield. Can you name any Perſon that ſaw you there?
Mrs. Phillips. Only a Servant for ſome Time, and then a Millener came.
Mr. Mansfield. Can you name thoſe Perſons?
Mrs. Phillips. I can't; I don't know them.
Mr. Mansfield. Can you name neither of them?
Mrs. Phillips. The Servant was *Fozard.*
Mr. Mansfield. Can you name no other Servants that you ſaw there?
Mrs. Phillips. No; I had an Inflammation in my Eye, and the Lady was exceedingly kind to me; ſhe ordered an Egg to be boiled for me, and *Fozard* brought it, in order that it might be opened and laid on my Eye.
Mr. Mansfield. Can you name any other Servants whom you ſaw there?
Mrs. Phillips. I don't remember.
Lord Camden. My Lords, I obſerve in the Entry of the Regiſter the Words "*was married*" are ſtruck through with a Black Line; I want to know of the Witneſs whether ſhe can account for that Stroke?
Mrs. Phillips. I cannot.
Mr. Dunning. It is a Repetition. There is Marriage written in the Margin. "*Auguſt* "the 24th, married." The Entry then proceeds, "The Honorable *Auguſtus Hervey*, Eſq; "*was married*," which being a Repetition, I ſuppoſe they ſtruck that through with a Black Line.
Lord Camden. I believe it is ſo.
Mr. Dunning. If your Lordſhips pleaſe, the next Witneſs to be called is

The Reverend Mr. STEPHEN KENCHEN, *who was ſworn in like Manner.*

Mr. Dunning. You ſucceeded Mr. *Amis* in this Church at *Lainſton*, I believe?
Mr. Kenchen. I did.
Mr. Dunning. When did you firſt ſee that Book that he has in his Hand, and how did it come there?
Mr. Kenchen. The firſt Time that I ſaw the Book was after the Death of Mrs. *Hanmer*, Aunt to Mr. *Merrill*, who was buried in the Vault of that little Church.
Mr. Dunning. By whom was that Book produced to you, and for what Purpoſe?
Mr. Kenchen. In order to regiſter Mrs. *Hanmer*'s Burial.
Mr. Dunning. By whom?
Mr. Kenchen. By Mr. *Merrill.*
Mr. Dunning. Did you accordingly make an Entry of the Burial of Mrs. *Hanmer?*
Mr. Kenchen. I made an Entry of the Burial of Mrs. *Hanmer.*
Mr. Dunning. What then became of the Book?
Mr. Kenchen. Mr. *Merrill* carried it back again to his own Houſe.
Mr. Dunning. When did you next ſee the Book?
Mr. Kenchen. At the Death of Mr. *Merrill.*
Mr. Dunning. By whom was the Book then produced to you?
Mr. Kenchen. I cannot ſay; either by Mr. or Mrs. *Bathurſt*, or in the Preſence of them both.
Mr. Dunning. Did you then make an Entry of the Burial of Mr. *Merrill?*
Mr. Kenchen. I did.
Mr. Dunning. What then became of the Book?
Mr. Kenchen. I have had it in my Poſſeſſion ever ſince.
Mr. Dunning. My Lords, I ſhall aſk no more Queſtions of this Witneſs.
Lord High Steward. Mr. *Wallace*, would you aſk this Witneſs any Queſtions?
Mr. Wallace. I have no Queſtions to put to this Witneſs.
Mr. Dunning. If your Lordſhips pleaſe, we will now call

The Reverend Mr. JOHN DENNIS, *who was ſworn in like Manner.*

Mr. Dunning. Look at that Book: Was you acquainted with the Hand-writing of the late Mr. *Amis?* You knew Mr. *Amis*, I preſume?
Mr. Dennis. I knew him perfectly well.

Mr.

Mr. Dunning. Do you know his Hand-writing when you ſee it?

Mr. Dennis. I have ſeen his Hand-writing often, as ſucceeding him in the Living.

Mr. Dunning. Did you ever ſee him write?

Mr. Dennis. I have ſeen him write, but not often.

Mr. Dunning. Look at that Hand-writing; tell me whether you believe the Two Entries in the Firſt Page of that Book are his Hand-writing?

Mr. Dennis. Yes, particularly his Name, *Thomas Amis*, ſeems very much ſo.

Mr. Dunning. Do you believe it to be his Hand-writing?

Mr. Dennis. I believe the Whole to be his Hand-writing.

Ordered to withdraw.

Mr. Dunning. I do not know whether, on the Part of the Priſoner, they mean to put us on the proving, which it is neceſſary for us to do if they require it, the Marriage with the Duke of *Kingſton.*

Mr. Wallace. We are are ready to admit that Fact. There is no Doubt of her being married by the Licence of the Archbiſhop of *Canterbury.*

Mr. Dunning. You will give us the Date.

Mr. Wallace. Mention what the Day is.

Mr. Dunning. The 8th of *March* 1769, I underſtand.

Mr. Dunning. My Lords, We are now going to prove a Caveat, entered by the Lady, upon the Apprehenſion of a Suit intended to be inſtituted by Mr. *Hervey* in the Spiritual Court.

Mr. JAMES, *who was ſworn in like Manner.*

Mr. Dunning. Do you know any Thing of the Caveat entered at *Doctors Commons* on the Part of the Lady at the Bar?

Mr. James. Yes, the Caveat is entered in this Book *(producing it).*

Mr. Dunning. Is that the proper Book, in which ſuch Entries ought to be made?

Mr. James. It is.

The Caveat was read by the Clerk, and is as follows: "The 18th of *Auguſt* 1768.
"Let no Citation, Intimation, or other Proceſs, or any Letters of Requeſt for the "ſame, to any other Judge or Juriſdiction whatſoever, iſſue under the Seal of this "Court at the Suit or Inſtance of the Honorable *Auguſtus John Hervey*, or his "Brother, againſt the Honorable *Elizabeth Chudleigh*, Spinſter, of any Cauſe or "Suit Matrimonial, without due Notice being given to Mr. *Nathaniel Biſhop*, "Proctor for the ſaid Honorable *Elizabeth Chudleigh*, who, on his being warned "thereto before the Judge of this Court, or his lawful Surrogate, will be ready by "himſelf or Counſel to ſhew juſt Cauſe of this ſame Caveat, and why no ſuch "Proceſs or Letters of Requeſt ſhould iſſue thereupon."

Mr. Wallace. The Witneſs merely produces the Book; he knows nothing of the Fact of the Entry being made?

Mr. James. I know Mr. *Biſhop*'s Clerk's Hand; this is his Hand-writing.

Mr. Dunning. Perhaps the Witneſs may know, that Mr. *Biſhop* was the Proctor employed by the Lady in the Courſe of that Suit?

Mr. James. I have heard ſo.

Mr. Attorney General. That appears on the Record they have put in.

Mr. Dunning. I underſtand, that it is the Pleaſure of ſome of your Lordſhips, that we ſhould go into the Proof of the Marriage of the Duke of *Kingſton?*

Mr. Wallace. It is admitted on the Part of the Priſoner.

Mr. Dunning. But as ſome of the Lords wiſh for the Proof, we will examine it.

The Reverend Mr. JAMES TREBECK, *who was ſworn in like Manner.*

Mr. Dunning. Be ſo good as find the Regiſter of the Marriage of the Duke of *Kingſton.*

Points it out; Clerk reads. "N° 92. Marriages in *March* 1769. N° 92. The moſt "noble *Evelyn Pierrepont*, Duke of *Kingſton*, a Batchelor, and the Honorable "*Elizabeth Chudleigh* of *Knightſbridge*, in St. *Margaret's*, *Weſtminſter*, a Spinſter, "were married by Special Licence of the Archbiſhop of *Canterbury* this 8th of "*March* 1769, by me *Samuel Harpur* of the *Britiſh Muſeum*. This Marriage "was ſolemnized between us,

"KINGSTON,
"ELIZABETH CHUDLEIGH."

In the Preſence of

"MASHAM, J. ROSS MACKYE,
"WILLIAM YEO, E. R. A. LAROCHE,
"A. K. F. GILBERT, ARTHUR COLLIER,
"JAMES LAROCHE jun. C. MASHAM."
"ALICE YEO,

Mr. Dunning. I am deſired to apprize your Lordſhips of a Fact, which may or may not be proved if thought neceſſary. Your Lordſhips have heard in the Evidence of the laſt Woman an Account of a certain Mr. *Spearing*, who was preſent. That Mr. *Spearing* could not be found; he, though Mayor of *Wincheſter*, is now found to be amuſing himſelf ſome where or other beyond Sea, God knows where. We have Witneſſes to give your Lordſhips that Account, if your Lordſhips think it neceſſary.——Will your Lordſhips now pleaſe to hear the Reverend Mr. *Harpur?*

The Reverend Mr. HARPUR, *who was ſworn in like Manner.*

Mr. Dunning. Did you perform the Marriage Ceremony between theſe Parties?
Mr. Harpur. Yes.
Mr. Dunning. At the Time mentioned in the Regiſter?
Mr. Harpur. Yes.
Lord High Steward. Have you any more Witneſſes to produce?
Mr. Dunning. We don't judge it neceſſary to offer to your Lordſhips any more Evidence in this Stage of the Buſineſs. If it ſhould become ſo, we reſerve to ourſelves the Right of examining them hereafter.
Mr. Wallace. I beg Mrs. *Phillips* may be called to the Bar, that a Letter may be produced to her, and that ſhe may ſay whether it is her Hand writing.

Mrs. PHILLIPS *called.*

Mr. Wallace. Is that your Hand-writing?
Mrs. Phillips. The Name is my Hand-writing.
Mr. Wallace. Is that your Letter?
Mrs. Phillips. It is my Letter.

A LETTER *from* JUDITH PHILLIPS *to her Grace the Ducheſs of* KINGSTON *read.*

"MY LADY DUCHESS,

"I write your Grace this Letter.—My Heart has ever been firmly attached to your Grace's "Intereſt and Pleaſure, and my utmoſt Wiſh to deſerve your Favour and Countenance. "Suffer me not then in my declining Years to think I have forfeited that Favour and Pro- "tection, without intentionally giving the moſt diſtant Cauſe.

"May I intreat your Grace to accept this as a *ſincere and humble Submiſſion* for any Failure "of Reſpect and Duty to your Grace; and permit me moſt humbly to intreat your Grace's "*kind Interceſſion* with my Lord Duke to *continue* Mr. *Phillips* his Steward, whoſe Happineſs "conſiſts only in acting and diſcharging his Duty to his Grace's Pleaſure. This additional "Mark of your Grace's Goodneſs we hope to be happy in; and in Return, the Remainder "of our Lives ſhall be paſſed in Gratitude and Duty. The Perſon who carries this will "wait to receive your Grace's Pleaſure and Commands to her, who remains, with the "greateſt Reſpect,

"MY LADY DUCHESS,
"Your Grace's moſt dutiful Servant,
"*November* 7, 1771. "J. PHILLIPS."

Mr.

Mr. Attorney General. The Evidence, your Lordſhips will recollect, given by the Witneſs was in Anſwer to a Queſtion, Whether her Huſband had or had not been *turned out of his Place?* pointing the Queſtion ſo as to give your Lordſhips, and to give the Witneſs to underſtand, that they meant the Circumſtance of being *turned out of his Place* ſhould go perſonally to the Diſcredit of her Huſband, and alſo imply ſome Memory of that in the Mind of the Wife. The Witneſs, in Anſwer to that, told your Lordſhips, with reſpect to ſuch Part of it as might be deemed to relate to her Huſband's Credit in the Buſineſs, that he had reſigned his Place under the Duke. The Letters which I have in my Hand, and will juſt ſtate to your Lordſhips, if it be thought neceſſary before the Calling of the Witneſs, is that very Correſpondence, by which it appears that he did ſo reſign his Employment under his Grace into his Grace's Hands. He wrote to his Grace at *Newmarket* from *Holm Pierrepont*. The Letter is dated the "17*th of October* 1771." And he writes thus:

"I have ever done my Duty with the ſtricteſt Regard to your Grace's Intereſt, and with "the moſt perfect Reſpect. I have declined accepting a good Settlement, to act con- "formable to your Grace's Pleaſure, which her Grace was pleaſed to promiſe ſhould be made "up to me, which muſt have eſcaped her Grace's Memory, as I have ſince had my Rent "conſiderably raiſed, and am much concerned to obſerve lately your Grace's Diſpleaſure; "and being conſcious of a faithful Diſcharge of my Duty, I muſt be unjuſtly repreſented "to your Grace. I hope your Grace will be pleaſed to permit my delivering up the Charge "of your Grace's Affairs, which, as an honeſt Man, I can only properly keep, while "ſatisfied myſelf, and honoured with your Grace's Approbation, &c."

In Anſwer to which he received this Letter:

"Mr. *Phillips*,

"Your Letter came to me at *Newmarket*. After what has paſſed, there is no Occaſion "for many Words. *Sherin* will be at *Holm Pierrepont* ſometime next Week, with my Orders "about ſettling your Buſineſs, which I flatter myſelf you will readily comply with.

"I am yours, &c. &c."

I believe I may refer to your Lordſhips Memory, that Mrs. *Phillips* mentioned his Grace's having looked coolly on her Huſband, which occaſioned his Reſignation.

A Peer. What is that, Mr. Attorney General, that you have been reading?

Mr. Attorney General. The Firſt is a Copy of a Letter to the Duke; the other the Duke's original Anſwer. If it is thought material enough to trouble your Lordſhips with it, we can eaſily prove that this is his Grace's Hand-writing, and this the Copy of his Grace's Letter, which was all that was neceſſary.

ADJOURNED to MONDAY.

MONDAY, April 22. *The Fifth and laſt Day.*

THE Lords and others came from the Chamber of Parliament in the cuſtomary Order. Proclamation for Silence being made as uſual, the Ducheſs of *Kingſton* was conducted to the Bar, when her Grace addreſſed the Lords in the following Terms:

My Lords,

THIS my reſpectful Addreſs will, I flatter myſelf, be favourably accepted by your Lordſhips; my Words will flow freely from my Heart, adorned ſimply with Innocence and Truth. My Lords, I have ſuffered unheard-of Perſecutions; my Honour and Fame have been ſeverly attacked; I have been loaded with Reproaches; and ſuch Indignities and Hardſhips have rendered me the leſs able to make my Defence before this auguſt Aſſembly againſt a Proſecution of ſo extraordinary a Nature, and ſo undeſerved.

My Lords, With Tenderneſs conſider how difficult is the Taſk, of myſelf to ſpeak, nor ſay too little nor too much: Degraded as I am by Adverſaries; my Family deſpiſed; the honourable Titles on which I ſet an ineſtimable Value, as received from my moſt noble and

and late dear Huſband, attempted to be torn from me. Your Lordſhips will judge how greatly I ſtand in need of your Protection and Indulgence.

My Lords, Were I here to plead for Life, for Fortune, no Words from me ſhould beat the Air; the Loſs I ſuſtain in my moſt kind Companion and affectionate Huſband, makes the former more than indifferent to me; and, when it ſhall pleaſe Almighty God to call me, I ſhall willingly lay that Burthen down. I plead before your Lordſhips for my Fame and Honour.

My Lords, Logic is properly defined, and well repreſented in this High Court. It is a Talent of the human Mind, and not of the Body, and holds a Key which ſignifies, that Logic is not a Science itſelf, but the Key to Science; that Key is your Lordſhips judicial Capacity and Wiſdom. On the Left-hand is repreſented a Hammer, and before it a Piece of falſe, and another of pure Gold. The Hammer is your penetrating Judgment, which, by the Mercy of God, will ſtrike hard at falſe Witneſſes who have given Evidence againſt me, and prove my Intention in this pending Cauſe as pure as the fineſt Gold, and as juſtly diſtinguiſhed from the Sophiſtry of Falſhood.

My Lords, Your unhappy Priſoner is born of an ancient, not ignoble Family; the Women diſtinguiſhed for their Virtue, the Men for their Valour; deſcended in an honourable and uninterrupted Line for Three Centuries and a Half: Sir *John Chudleigh*, the laſt of my Family, loſt his Life at the Siege of *Oſtend*, at Eighteen Years of Age, gloriouſly preferring to die with his Colours in his Boſom, rather than accept of Quarter from a gallant *French* Officer, who, in Compaſſion to his Youth, Three Times offered him his Life for that Enſign, which was ſhot through his Heart. A happy Death! that ſaves the Bluſh he would now feel for the unheard-of Injuries and Diſhonour thrown on his unfortunate Kinſwoman, who is now at the Bar of this Right Honourable Houſe.

His Grace the late Duke of *Kingſton*'s Fortune, of which I now ſtand poſſeſſed, is valuable to me, as it is a Teſtimony to all the World how high I was in his Eſteem. As it is my Pride to have been the Object of Affection of that virtuous Man, ſo ſhall it be my Honour to beſtow that Fortune to the Honour of him who gave it to me, well knowing, that the wiſe Diſpoſer of all Things would not have put it in his Heart to prefer me to all others, but that I ſhould be as faithful a Steward, as I was a faithful Wife; and that I ſhould ſuffer others, more worthy than myſelf, to ſhare theſe his great Benefits of Fortune.

My Lords, I now appeal to the Feelings of your own Hearts, whether it is not cruel, that I ſhould be brought as a Criminal to a publick Trial for an Act committed under the Sanction of the Laws.—An Act that was honoured with his Majeſty's moſt gracious Approbation; and previouſly known and approved of by my Royal Miſtreſs, the late Princeſs Dowager of *Wales*; and likewiſe authorized by the Eccleſiaſtical Juriſdiction; your Lordſhips will not diſcredit ſo reſpectable a Court, and diſgrace thoſe Judges who there ſo legally and honourably preſide. The Judges of the Eccleſiaſtical Court do not receive their Patents from the Crown, but from the Archbiſhops or Biſhops. Their Juriſdiction is competent in Eccleſiaſtical Caſes, and their Proceedings are conformable to the Laws and Cuſtoms of the Land, according to the Teſtimony of the learned Judge *Blackſtone* * (whoſe Works are as entertaining as they are inſtructive) who ſays, "It muſt "be acknowledged, to the Honour of the Spiritual Courts, that though they continue to "this Day to decide many Queſtions which are properly of Temporal Cognizance, yet "Juſtice is in general ſo ably and impartially adminiſtered in thoſe Tribunals (eſpecially of "the ſuperior Kind) and the Boundaries of their Power are now ſo well known and eſta-"bliſhed, that no material Inconvenience at preſent ariſes from their Juriſdiction. And "ſhould an Alteration be attemped, great Confuſion would probably ariſe, in overturning "long eſtabliſhed Forms, new modelling a Courſe of Proceedings that has now prevailed "for Seven Centuries."—And I muſt here preſume to add, as founded on Truth, that that Court (of which his Majeſty is the Head) cannot be ſtopped by any Authority whatſoever, while they act in their own Juriſdiction.——Lord Chief Juſtice *Hale* ſays, "where there "has been a Sentence of Divorce (which is a Criminal Caſe) if that Sentence is ſuſpended by "an Appeal to the Court of Arches (as a ſuperior Court) and while that Appeal is depend-"ing, One of the Parties marries again, the Sentence will be a Juſtification within the "Exception of the Act of Parliament, notwithſtanding that the Sentence has been appealed "from, and conſequently may be reverſed by a ſuperior Court." And, my Lords, how much more Reaſon is there for its coming within the Exception of the Act in my Caſe, ſince no Appeal had been made?

My Lords, I earneſtly look up to your Lordſhips for Protection, as being now a Sufferer for having given Credit to the Eccleſiaſtical Court. I reſpectfully call upon you, my Lords, to protect the Spiritual Juriſdiction, and all the Benefit of religious Laws, and me, an unhappy

* Vol. III. Chap. vii. Page 98.

happy Priſoner, who inſtituted a Suit of Jactitation upon the Advice of a learned Civilian, who carried on the Proſecution, from which I obtained the Sentence that authorized your Priſoner's Marriage with the moſt Noble *Evelyn* Duke of *Kingſton*, that Sentence ſolemnly pronounced by *John Betteſworth*, Doctor of Laws, Vicar General of the Right Reverend Father in God *Richard* by Divine Permiſſion Lord Biſhop of *London*, and Official Principal of the Conſiſtorial Court of *London*, the Judge thereof, calling on God, and ſetting him alone before his Eyes, and hearing Counſel in that Cauſe, did pronounce, that your Priſoner, then the Honourable *Elizabeth Chudleigh*, now *Elizabeth* Dowager Ducheſs of *Kingſton*, was free from all matrimonial Contracts or Eſpouſals, as far as to him at that Time appeared, more eſpecially with the ſaid Right Honourable *Auguſtus John Hervey*.

My Lords, Had this Proſecution been ſet on foot merely for the Love of Juſtice, or good Example to the Community, why did they not inſtitute their Proſecution during the Five Years your Priſoner was received and acknowledged the undoubted and unmoleſted Wife of the late Duke of *Kingſton?*

My Lords, The Preamble of the very Act on which I am indicted, plainly and intirely precludes your Priſoner: It runs thus, " Foraſmuch as divers evil diſpoſed Perſons, " being married, run out of one County into another, or into Places where they are not " known, and there become to be married, having another Wife or Huſband living, to " the great Diſhonour of God, and utter Undoing of divers honeſt Mens Children, and others, " *&c.*" And as the Preamble has not been conſidered to be ſufficient in my Favour to impede the Trial, I beg Leave to obſerve how much your Priſoner ſuffers by being produced before this Noble Houſe, on the Penalty of an Act of Parliament, without benefiting by the Preamble, which is ſuppoſed to contain the whole Subſtance, Extent, and Meaning of the Act.

My Lords, Upon your wiſe Reſult on my unhappy Caſe, you will bear in your willing Remembrance, that the Orphan and Widow is your peculiar Care; and that you will be tender of the Honour of your late Brother Peer, and ſee in me his Widow and Repreſentative, recollecting how eaſy it may be for a next of Kin to proſecute the Widows or the Daughters, not only of every Peer, but of every Subject of *Great Britan*, if it can be affected by the Oath of one ſuperannuated and intereſted old Woman, who declared Seven Years ago that ſhe was incapable of given Evidence thereon, as will appear in Proof before your Lordſhips. And I may further obſerve to your Lordſhips, that my Caſe is clearly within the Proviſo of the Statute on which I am indicted. In the Third Clauſe, it is " provided " that this Act ſhall not extend to any Perſon, where the former Marriage hath been, or " hereafter ſhall be, declared by Sentence of the Eccleſiaſtical Court to be void, and of " no Effect."

If there is ſuppoſed to have been a former Marriage, the ſame muſt have been a true Marriage, or a falſe one. If a true one, it cannot be declared void; and if a falſe one, or the Semblance of one only, then only, and No otherwiſe, is it that it can be declared void.——Therefore muſt this Proviſo have reſpect to pretended Marriages only, and to none other, and ſuch only it is, that can be the Objects of Cauſes of Jactitation, the Sentence in which is a more effectual Divorce and Separation of the Parties, than many Divorces which have been determined to fall within this Proviſo.——The Crime charged in the Indictment was not a Felony, or even a Temporal Offence, until the Act of *James* the Firſt; till then, it was only cognizable in the Eccleſiaſtical Court; and though an Indictment could lie for a ſlight Blow, yet the Common Law did not allow of a Criminal Proſecution for Polygamy until that Period; ſo that if the Caſe comes within the Exception of the only Statute upon that Subject, it is no Offence at all; and Dr. *Sherlock*, Biſhop of *London*, has ſaid, in ſuch Caſes the Law of the Land is the Law of God.

My Lords, I have obſerved, that I had greatly ſuffered in Fame and Fortune by the Reports of Mr. *Hervey*; and I beg Leave to mention in what Manner: Your Priſoner was at that Time poſſeſſed of a ſmall Eſtate in the County of *Devon*, where Sir *George Chudleigh*, her Father's eldeſt Brother, had large Poſſeſſions: The Purchaſe of that Eſtate was much ſolicited in that County; and having frequent Opportunities to diſpoſe of it, it was ever made an inſuperable Objection by the intended Purchaſer, that I could not make a clear Title to the Eſtate on account of Mr. *Hervey*'s Claim to your Priſoner as his Wife.

And your Priſoner being alſo poſſeſſed of building Lands for a great Number of Years, for the ſame Reaſons ſhe never had the Ground covered (valued at 1,200l. *per Annum*). And as your Priſoner's Health declined, and made it neceſſary for her to ſeek Relief in foreign Climes (which increaſed her Expences beyond what her Circumſtances could ſupport) and her little Fortune daily decreaſed by Money taken up on Mortgage and Bond, as will appear by the Evidence of Mr. *Drummond*; her Royal Miſtreſs likewiſe in the Decline of Life,

whoſe Death would probably have deprived her of 400*l.* a Year; the Perſecutions threatened on Mr. *Hervey*'s Side preſented but a gloomy Proſpect for her declining Life; your Priſoner was induced, as ſhe before obſerved to your Lordſhips, to follow the Advice of Doctor *Collier*, and inſtituted the Suit of Jactitation, your Priſoner ſubſcribing entirely to his Opinion; and following his Advice and Inſtructions, which ſhe preſumes alone is a full Defence againſt the Charge of Felony; for your Lordſhips in your great Candour cannot think, that a Lady can know more of the Civil Law, than her learned Civilians could point out to her.

And as a criminal and felonious Intent is neceſſary to conſtitute the Offence with which I ſtand charged, certainly I cannot be guilty in following the Advice I received, and in doing what in my Conſcience I thought an authorized and innocent Act.

My Lords, Though I am aware, that any Perſon can proſecute for the Crown for an Offence againſt an Act of Parliament, yet I will venture to ſay, that few Inſtances, if any, have been carried into Execution without the Conſent of the Party injured; and with great Deference to your Lordſhips Judgment I venture to declare, that in the preſent Caſe no Perſon whatever has been injured, unleſs your Lordſhips Candour will permit me to ſay that I am injured, being now the Object of the undeſerved Reſentment of my Enemies. It is plain to all the World that his Grace the Duke of *Kingſton* did not think himſelf injured, when in the ſhort Space of Five Years his Grace made Three Wills, each ſucceeding one more favourable to your Priſoner than the other, giving the moſt generous and inconteſtable Proof of his Affection and Solicitude for my Comfort and Dignity; and it is more than probable, my Lords, from the well-known mutual Friendſhip ſubſiſting between us, that had I been intereſted, I might have obtained the Bulk of his Fortune for my own Family; but I reſpected his Honour, I loved his Virtues, and had rather have forfeited my Life than have uſed any undue Influence to injure the Family; and though it has been induſtriouſly and cruelly circulated, with a View to prejudice me, that the Firſt-born of the late Duke's Siſter was deprived of the Succeſſion to his Grace's Fortune by my Influence, the Wills, my Lords, made in Three diſtant Periods, each excluding him, demonſtrate the Calumny of theſe Reports.

I muſt further obſerve to your Lordſhips, in Oppoſition to the Charge againſt me of Intereſtedneſs, that had I poſſeſſed or exerciſed that undue Influence with which I am charged by the Proſecutor, I might have obtained more than a Life-intereſt in the Duke's Fortune; and though from the Affection I bear to the Memory of my late much honoured Huſband, I have forborne to mention the Reaſon of his diſinheriting his eldeſt Nephew, yet *Charles* the Second Son, with his Heirs, appear immediately after me in Succeſſion, *William* and his Heirs follow next, after him *Edward* and his Heirs, and the unfortunate *Thomas*, Lady *Frances*'s youngeſt Son, is not excluded, though labouring under the Infirmities of Childhood at the Age of Manhood, and not able to ſupport himſelf. For the late Noble Duke of *Kingſton* repeatedly mentioned to your Priſoner, "I have not excluded him, for he has never "offended; and who can ſay God cannot reſtore him? who can ſay that God will not reſtore "him to Health?" My Lords, that good Man did Honour to the Peerage, Honour to his Country, Honour to human Nature.

His Grace the moſt Noble Duke of *Newcaſtle* appeared with the Will, which had been intruſted to his Grace for Four Years by his late dear Friend. In Honour to the Lady *Frances Meadows* the Proſecutor was requeſted to attend at the Opening of the Will; he retired with Diſpleaſure, diſappointed that his eldeſt Son was diſinherited, and unthankful, though the Duke's Fortune ſtill centered in his Four youngeſt Sons and their Poſterity.

My Lords, Worn down by Sorrow, and in a wretched State of Health, I quitted *England* without a Wiſh for that Life which I was obliged by the Laws of God and Nature to endeavour to preſerve; for your Priſoner can with great Truth ſay, that Sorrow had bent her Mind to a perfect Reſignation to the Will of Providence. And, my Lords, while your unhappy Priſoner was endeavoring to re-eſtabliſh her greatly impaired Health abroad, my Proſecutor filed a Bill in Chancery upon the moſt unjuſt and diſhonourable Motives. Your Priſoner does not complain of his endeavouring to eſtabliſh a Right to himſelf; but ſhe does complain of his forming a Plea on diſhonourable and unjuſt Opinions of his late noble Relation and generous Benefactor, to the Prejudice and Diſcredit of his much afflicted Widow; and not ſatisfied with this Proſecution, as a Bulwark for his Suit in Chancery, he cruelly inſtituted a Criminal Proſecution, in Hopes, by a Conviction in a Criminal Cauſe, to eſtabliſh a Civil Claim, a Proceeding diſcountenanced by the Opinion of the late Lord *Northington*.

My Lords, I have heretofore forborne, from the great Love and Affection to my late Noble Lord, to mention what were the real Motives that induced his Grace to diſinherit his eldeſt Nephew; and when my Plea and Anſwer in Chancery were to be argued, I particularly

ticullarly requeſted of the Counſel to abſtain from any Reflections upon my Adverſaries, which the Nature of their Proſecutions too much deſerved, and grieved I am now, that I muſt no longer conceal them. For as Self-preſervation is the Firſt Law of Nature, and as I am more and more perſecuted in my Fortune and my Fame, and my Enemies hand about Pocket-evidence to injure me in every Company, and with double Tongues they ſting me to the Heart, I am reduced to the ſad Neceſſity of ſaying, that the late Duke of *Kingſton* was made acquainted with the fatal Cruelty, with which Mr. *Evelyn Meadows* treated an unfortunate Lady, who was as amiable as ſhe was virtuous and beautiful; to cover which Offence, he moſt ungratefully and falſely declared, that he broke his Engagements with her for fear of diſobliging the Duke, which he has often been heard to ſay. This, with his Cruelty to his Siſter and Mother, and an Attempt to quit actual Service in the late War, highly offended the Duke; and it would be difficult for him, or his Father, to boaſt of the leaſt friendly Intercourſe with his Grace for upwards of Eighteen Years.

My Lords, In a dangerous State of Health, when my Life was deſpaired of, I received a Letter from my Solicitor, acquainting me, that if I did not return to *England* to put in an Anſwer to the Bill in Chancery within Twenty-one Days, I ſhould have Receivers put into my Eſtates; and alſo, that if in Contempt of the Indictment I did not return, I ſhould be outlawed. It clearly appeared to me, my Lords, as I make no Doubt it does to your Lordſhips, that if in the Inclemency of the Weather I riſqued to paſs the *Alps*, my Life would probably be endangered, and the Family would immediately enter into Poſſeſſion of the real Eſtates; and if Female Fears ſhould prevail, that I ſhould be outlawed. Thus was I to be deprived of Life and Fortune under Colour of Law; and that I might not return to theſe perſecuting Summonſes, by ſome undue and cruel Proceedings my Credit was ſtopped by my Banker for £.4,000, when there remained an open Account of £.75,000, and at that Inſtant upwards of £.6000 was in his Hands, my Revenues being conſtantly paid into his Shop to my Credit. Thus was I commanded to return Home at the manifeſt Riſque of my Life, and at the ſame Time every Art uſed to deprive me of the Means of returning for my Juſtification. Conſcious of the perfect Innocence of my Intention, and convinced that the Laws of this Country could not be ſo inconſiſtent as to authorize an Act, and then defame and degrade me for having obeyed it, I left *Italy* at the Hazard of my Life: It was not for Property I returned, but to prove myſelf an honourable Woman. Grant me, my Lords, but your good Opinion, and that I ſtand juſtified in the Innocence of my Intention, and you can deprive me of nothing that I value, even if you ſhould take from me all my worldly Poſſeſſions; for I have reſted on that Seat where the poor blind *Beliſarius* is ſaid to have aſked Charity of every Paſſenger, after having conquered the *Goths* and *Vandals*, *Africans* and *Perſians*, and would do the ſame without murmuring, if you would pronounce me, what I hope your Lordſhips will chearfully ſubſcribe to—that I am an honourable Woman.

My Lords, Your late Brother, the truly honourable Duke of *Kingſton*, whoſe Life was adorned by every Virtue and every Grace, does not his moſt reſpectable Character plead my Cauſe and prove my Innocence?

My Lords, The Evidence of the Fact of a ſuppoſed clandeſtine Marriage with Mr. *Hervey* depends entirely upon the Teſtimony of *Ann Cradock*.

I am perſuaded your Lordſhips, from the Manner in which ſhe gave her Evidence, already entertain great Suſpicions of the Veracity of her Teſtimony. She pretends to ſpeak to a Marriage Ceremony being performed, at which ſhe was not aſked to be preſent, nor can ſhe aſſign any Reaſon for her being there.—She relates a Conduct in Mrs. *Hanmer*, who ſhe pretends was preſent at the Ceremony, inconſiſtent with a real Marriage; ſhe acknowledges that ſhe was in or about *London* during the Jactitation Suit, and that Mr. *Hervey* applied to her on that Occaſion, and ſwears that ſhe then and ever had a perfect Remembrance of the Marriage, and was ready to have proved it, had ſhe been called upon, and never declared to any Perſon that ſhe had not a perfect Memory of the Marriage, and that ſhe never was deſired either to give or with-hold her Evidence; and from Mr. *Hervey*'s not calling on this Woman, it is inſinuated he abſtained from the Proof by Colluſion with me. She alſo ſwears, that I offered to make her an Allowance of Twenty Guineas a Year, provided ſhe would reſide in either of the Three Counties ſhe has mentioned, but acknowledges ſhe has received no Allowance from me. Can your Lordſhips believe, that if I could have been weak enough to have inſtituted the Suit, with a Conviction in my own Mind of a real lawful Marriage between Mr. *Hervey* and myſelf, that I would not, at any Expence, have taken Care to have put that Woman out of the Way? But, my Lords, I truſt that your Lordſhips will be perfectly ſatisfied, that great Part of the Evidence of this Woman is made for the Purpoſe of the Proſecution; though ſhe has denied ſhe has any Expectation from the Event, or ever

declared ſo, yet it will be proved to your Lordſhips, that her future Proviſion (as ſhe has declared) depends upon it: And notwithſtanding ſhe has now brought herſelf up to ſwear that ſhe heard the Ceremony of Marriage performed, yet it will be proved that ſhe has declared, ſhe did not hear it; and it will be further proved to your Lordſhips, that Mr. *Hervey* was extremly ſolicitous to have eſtabliſhed a legal Marriage with me for the Purpoſe mentioned by Mr. *Hawkins*, and that this Woman was actually applied to and declared to Mr. *Hervey*'s Solicitor, that her Memory was impaired, and that ſhe had not any Recollection of it, which was the Reaſon why ſhe was not called as a Witneſs.

My Lords, If ſhe is thus contradicted in theſe Particulars, and appears under the Influence of Expectations from this Event of the Proſecution, your Lordſhips will not credit her Evidence, that the complete Ceremony of Marriage was performed, or any other Particulars which reſt upon her Evidence.

My Lords, With reſpect to what your Lordſhips have heard from the Witneſſes, of my Deſire at Times to be conſidered as the Wife of Mr. *Hervey*, your Lordſhips in your Candour will naturally account for that Circumſtance, after the unfortunate Connection that had ſubſiſted between us.

My Lords, I call God Almighty, the Searcher of Hearts, to witneſs, that at the Time of my Marriage with the Duke of *Kingſton*, I had, myſelf, the moſt perfect Conviction that it was lawful. That noble Duke, to whom every Paſſage of my Life had been diſcloſed, and whoſe Affection for me, as well as Regard for his own Honour, would never have ſuffered him to have married me, had he not as well as myſelf received the moſt ſolemn Aſſurances from Doctor *Collier*, that the Sentence, which had been pronounced in the Eccleſiaſtical Court, was abſolutely final and concluſive, and that I was perfectly at Liberty to marry any other Perſon. If therefore I have offended againſt the Letter of the Act, I have ſo offended without criminal Intention. Where ſuch Intention does not exiſt, your Lordſhips Juſtice and Humanity will tell you there can be no Crime; and your Lordſhips, looking on my diſtreſſed Situation with an indulgent Eye, will pity me as an unfortunate Woman, deceived and miſled by erroneous Notions of Law, of the Propriety of which it was impoſſible for me to judge.

My Lords, Before I take my Leave, permit me to expreſs my warm and grateful Senſe of the Candour and Indulgence of your Lordſhips, which have given me the firmeſt Confidence that I ſhall not be deemed criminal by your Lordſhips for an Act, in which I had not the leaſt Suſpicion that there was any Thing illegal or immoral.

My Lords, I have loſt, or miſlaid, a Paper, where I had put together my Ideas to preſent to your Lordſhips. The Purport was to tell your Lordſhips, that my Advocate Doctor *Collier*, who inſtituted this Suit of Jactitation, is now in a dangerous State of Health; he has had Two Phyſicians to attend him, by my Order, Yeſterday, to inſiſt and order his Attendance to acquaint your Lordſhips, that I acted entirely under his Directions; that it was by his Advice I married his Grace the Duke of *Kingſton*, aſſuring me that it was lawful; that he had the Honour of going to his Grace the Archbiſhop of *Canterbury* to obtain a Licence, and to explain every Part that regarded the Cauſe; that his Grace was ſo juſt, ſo pious, and ſo good, as to take Time to conſider whether he would grant us a ſpecial Licence for the Marriage: After mature Conſideration and Conſultation with great and honourable Perſons in the Law, he returned the Licence to Doctor *Collier*, with full Permiſſion for our Marriage. Doctor *Collier* was preſent at the Marriage; Doctor *Collier* ſigned the Regiſter of St. *George*'s Church. Mr. *La Roche* has frequently attended the Duke of *Kingſton* to Doctor *Collier*, where he heard him conſult the Doctor if the Marriage would be lawful; he ſaid it would, and never could be controverted.

Under theſe Circumſtances, I wiſhed to bring my Advocate forth to protect me. He, my Lords, is willing to make an Affidavit, to be examined by the Enemy's Counſel, to ſubmit to any Thing that your Lordſhips can command, willing to juſtify his Conduct; but he has had the Misfortune, my Lords, ever ſince the latter End of *Auguſt*, or the Firſt Week in *September*, I do not well remember which, never to have been in Bed. I apprehended, from ſeeing him Yeſterday, with your Lordſhips Indulgence, that he had the St. *Anthony*'s Fire; but my Phyſicians, who have been with him, can give a better Account, if you will permit them, of the State of his Health, that your Lordſhips may not imagine that he keeps back, or that I am afraid to produce him. If it is not to avail me in Law, I aſk no Favour; but I petition your Lordſhips, and would, upon my Knees, that you will hear the Evidence that he will give to the Juſtification of my Honour, though it does not avail me in Law.

My Lords, I do requeſt that Doctor *Collier* may be examined in the ſtricteſt Manner, and by every Enemy that I have in the World. My Phyſicians ſaw him laſt Night, and they can, previous to his Examination, inform your Lordſhips in what State they apprehend him to be.

Lord Ravenſworth. After what I have juſt heard from the Priſoner at the Bar, it is impoſſible not to feel equally with the Reſt of your Lordſhips: And, my Lords, what came laſt from the Priſoner at the Bar I own ſtrikes me with the Neceſſity of Permiſſion being given, if it could be done, to have Doctor *Collier* examined.

Lord Camden. I am really, my Lords, at ſome Loſs to know, upon what Ground it is your Lordſhips ſtand at this Moment with reſpect to the Evidence of Doctor *Collier*. I do not underſtand yet, that Doctor *Collier* is called by the Priſoner or by her Counſel. I do not yet underſtand, that in Conſideration of the infirm State of his Health the Priſoner or her Counſel do require from your Lordſhips any ſpecific particular Mode of Examination, by which your Lordſhips might be appriſed of the Subſtance of his Evidence. I underſtand neither of theſe Things to be moved to your Lordſhips; if they were, Matter of Debate on either one or the other might probably ariſe, and then this is not the Place for your Lordſhips to enter into a Conſideration of it. With regard to the Caſe itſelf, which the noble Priſoner has made for one of her moſt material Witneſſes, it is undoubtedly ſuch as would touch your Lordſhips with a proper Degree of Compaſſion, as far as the Juſtice of the Court can go, and your Feelings are able indulge; beyond that it is impoſſible, let your Lordſhips Deſire be what it may: For you to tranſgreſs the Law of the Land, or to go beyond the Rules preſcribed by thoſe Laws, is impoſſible. A Witneſs ſo infirm that he is totally incapable of Attendance! your Lordſhips, if you are to loſe his Evidence, will lament the Want of it: Juſtice cannot be ſo perfect and complete without the Examination of a neceſſary and material Witneſs, as if you had it; but if a greater Evil than that ſhould happen (and it has frequently happened in the Courſe of Cauſes) which is Death itſelf, which ſhuts up the Mouth in everlaſting Silence, if this ſhould arreſt the Witneſs before he could be produced, his Evidence is loſt for ever. If this Witneſs ſhould by his Infirmity be totally unable to attend whilſt this Cauſe laſts, I am ſorry to ſay your Lordſhips muſt go on without him; it is impoſſible to wait until that Witneſs can be produced: While the Cauſe laſts (and your Lordſhips will precipitate nothing in the Courſe of Juſtice) if he can be brought, you will make every Accommodation to receive him, you will take every Means in your Power to make the Attendance ſafe and convenient for him, you will receive him in any Part of the Cauſe, even at the laſt Moment before it is concluded. So far your Lordſhips may go; beyond that, I doubt, you cannot. But, my Lords, I have now been ſpeaking without a Queſtion, without a Motion, without any Thing demanded of your Lordſhips by the Priſoner or by her Counſel.

Lord Ravenſworth. I would beg Leave to put it to thoſe noble Lords who ſit upon the Bench, Whether there ever was an Inſtance in a Criminal Cauſe of a Witneſs being examined otherwiſe than in open Court?

Lord Camden. The noble Lord is pleaſed to put a Queſtion particularly pointed to ſuch of your Lordſhips as have been educated in the Profeſſion of the Law, to know "Whether "any Inſtance can be produced where a Witneſs, not attending at your Bar to be examined "*viva Voce*, has been permitted by Commiſſion, by Delegation, or any other Manner what-"ever, to give his Evidence out of Court, ſo that that Evidence, ſo given out of Court, "might be reported into the Court, and ſtand as Evidence on the Trial?" I preſume that is the Point, in which the noble Lord deſires to know if any Precedent can be produced. When that Queſtion is aſked, and the Anſwer is to be a Negative, your Lordſhips eaſily conceive how much the Modeſty of the Anſwerer is to be affected, if he gives a full, a poſitive, and a round Negative to that Queſtion. I therefore beg to be underſtood as confining the Anſwer to my own Knowledge. Within the Courſe of my own Practice and Experience I never did know of ſuch an Inſtance; I never have, to the beſt of my Memory, read of ſuch an Inſtance; I never heard of ſuch an Inſtance; I ſpeak in the Preſence of thoſe who are better verſed in this Kind of Knowledge than myſelf; I ſpeak before the Law of the Land, which is now upon your Lordſhips Wool-ſacks. My Lords, if any ſuch Caſe occurs to them, it will be eaſy for your Lordſhips to apply to them; I know of no ſuch, and if I might add briefly One Word on the Subject, I hope I ſhall never ſee ſuch an Inſtance ſo long as I live in this World. What, my Lords! to give up, and to part with, that noble Privilege in the Mode of open Trial, of Examinations of Witneſſes *viva Voce* at your Bar, with a Croſs Examination to confront them in the Eye of the World, and to transfer

that to a private Chamber on a few written Interrogatories! I go too far in arguing the Point: I never knew an Inſtance; I am in the Judgment of the Houſe, and of the learned Judges that hear me; if there ever was an Inſtance, let it be produced, and in God's Name let Juſtice be done.

The Lords then proceeded to hear the Witneſſes.

Lord High Steward. Mr. *Wallace*, you may proceed to call your Witneſſes.
Mr. Wallace. The Firſt Witneſs I would call is

Mr. BERKLEY, *who was ſworn in like Manner.*

Mr. Berkley. My Lords, What Knowledge I had of this Buſineſs aroſe from my being Attorney to Lord *Briſtol*, and I muſt leave it to your Lordſhips, whether I ought to be examined as being Attorney for Lord *Briſtol* conſiſtent with Honour to myſelf and the Duty I owe to him.

Mr. Wallace. I know the Delicacy of the Sitaution of an Attorney: I merely call Mr. *Berkley* to what paſſed between him and Mrs. *Cradock*, being ſent to get her to attend and prove the Marriage.

Lord Mansfield. With regard to the Demurrer put in by Mr. *Berkley* to the Queſtion that is aſked him, when they make him a Witneſs, they ſubject him to Croſs Examinations; but the Point is, whether he, as being concerned as Solicitor for my Lord *Briſtol*, can demur to the Queſtion put to him to know, what this Woman ſaid when he went to deſire her to come to give Evidence? and as to that, there ſeems to be no Colour to the Demurrer; for the Protection of Attorneys is as to what is revealed to them by their Client, in order to take their Advice or Inſtruction with regard to their Defence. This is no Secret of the Client, but is to a collateral Fact, what a Party ſaid to him upon ſuch an Application; and it has been often determined, that as to Fact an Attorney or Counſel has no Privilege to withhold his Evidence if there is a Doubt; even if he ſwears to an Anſwer in Chancery, he cannot protect himſelf from ſwearing, whether that is his Client's Hand or not, or to his having ſworn it, or the Execution of a Deed; it does not come within the Objection to an Attorney revealing the Secrets of his Client. I ſuppoſe it is only mentioned to your Lordſhips for a Juſtification. If none of your Lordſhips are of a different Opinion, it will ſave Time, and the Witneſs will underſtand it to be the Opinion of all your Lordſhips.

Mr. Wallace. I beg to know, whether you ever made any Application to Mrs. *Cradock* relative to her being a Witneſs to the Marriage?

Mr. Berkley. I did.

Mr. Wallace. At what Time?

Mr. Berkley. It was after my Lord *Briſtol* was ſerved with a Citation to Doctors Commons.

Mr. Wallace. For what Purpoſe did you apply to her?

Mr. Berkley. To know, what ſhe knew relative to the Marriage between Lord *Briſtol* and Miſs *Chudleigh*.

Mr. Wallace. What Anſwer did Mrs. *Cradock* give to that?

Mr. Berkley. My Lord *Briſtol* was preſent. She ſaid ſhe was very old, very infirm, and the Tranſaction happened many Years ago, and ſhe could not at that Diſtance of Time remember any Thing of the Matter; upon which my Lord *Briſtol* ſeemed vaſtly ſurprized, and ſaid, How can you ſay ſo? or to that Effect.

Mr. Wallace. Did ſhe perſiſt in not remembering any Thing of the Tranſaction?

Mr. Berkley. She did, and ſaid ſhe remembered nothing of the Matter; and that was the only Time I ever ſaw her.

Mr. Wallace. My Lords, I ſhall aſk Mr. *Berkley* no more Queſtions.

Mr. Attorney General. Was you ſent to her as a Perſon that was preſent at the Marriage?

Mr. Berkley. I was employed in order to collect Evidence from different People, whom my Lord *Briſtol* directed me to go to, and other People, with reſpect to the Marriage, as his Lordſhip wanted to have a Divorce; and in that Way I ſaw Mrs. *Cradock*.

Mr. Attorney General. Did Lord *Briſtol* explain his Want of a Divorce at the Time he ſent you to the Witneſs?

Mr. Berkley. The Direction I had from my Lord was in *May* 1768.

Mr.

Mr. Attorney General. Was it at that Time, that my Lord *Briſtol* told you he wanted a Divorce?

Mr. Berkley. It was.

Mr. Attorney General. What you have ſaid was after the Citation?

Mr. Berkley. When I ſaw the Witneſs, as well as I remember, it was after the Citation.

Mr. Attorney General. Did Lord *Briſtol* deſcribe the Witneſs to you as preſent at the Marriage?

Mr. Berkley. He did. My Lord ſaid, that ſhe could prove the Marriage.

Mr. Attorney General. When Lord *Briſtol* expreſſed himſelf ſurprized at that Diſappointment, did he then expreſs to you, that ſhe was One of thoſe preſent at the Marriage?

Mr. Berkley. I do not know that my Lord did.

Mr. Attorney General. Was ſhe never repreſented to you, as a Perſon preſent at the Marriage?

Mr. Berkley. I underſtood, as ſhe was repreſented to me, that ſhe was preſent at the Marriage.

Mr. Attorney General. Was her Huſband, Mr. *Cradock*, ever repreſented as being preſent at that Marriage?

Mr. Berkley. Mr. *Cradock* has often told me, that he was not.

Mr. Attorney General. The Queſtion that I mean to put upon that is, why was the Huſband called who was not preſent at the Marriage, and the Wife not called who was repreſented to be preſent at the Marriage?

Mr. Berkley. I know nothing of that; it went out of my Hands afterwards to Doctors Commons.

Mr. Attorney General. Did you decline that Part of the Buſineſs in reſpect to Doctors Commons.

Mr. Berkley. I apprehend, I could not act there.

Mr. Wallace. Are you an Attorney or a Proctor?

Mr. Berkley. An Attorney, not a Proctor.

Ordered to withdraw.

Mr. Mansfield. My Lords, We are now going to call Mrs. *Ann Pritchard* to contradict Part of the Evidence of *Ann Cradock*. We beg the Clerk may read the Part alluded to.

The Clerk of the Parliament was ordered to read that Part of the Evidence, but not having taken it down, Mr. Gurney *was ordered to produce his Notes. When they were produced, the Part alluded to could not be found; and*

Mr. *Mansfield* addreſſed himſelf to the Lords thus: This Witneſs, *Ann Pritchard*, is called to contradict Mrs. *Cradock*. In the Firſt Place, to prove that ſhe has told this Mrs. *Pritchard*, that ſhe had ſome Expectations of Advantage from this Proſecution; and likewiſe, that ſhe did tell this Witneſs, that ſhe did not hear any Part of the Ceremony read at the Time, when ſhe ſaid the Lady at the Bar and Lord *Briſtol* were married, though ſhe has repeatedly told your Lordſhips that ſhe had no View of Advantage from this Cauſe, and that ſhe had heard the Whole of the Ceremony read.

ANN PRITCHARD, *who was ſworn in like Manner.*

Mr. Mansfied. Do you know Mrs. *Cradock?*

Ann Pritchard. Yes.

Mr. Mansfield. Have you ever had any Converſation with Mrs. *Cradock* concerning the reading the Marriage Ceremony between the Lady at the Bar and Lord *Briſtol?*

Ann Pritchard. No, I never had.

Mr. Mansfield. Did you ever hear Mrs. *Cradock* ſay any Thing concerning that Ceremony, or her having heard it, or not heard it?

Ann Pritchard. Never, before ſhe was examined.

Mr. Mansfield. What do you mean, before ſhe was examined?

Ann Pritchard. Before a Maſter in Chancery.

Mr. Mansfield. When was that?

Ann Pritchard. I cannot particularly ſay the Time; it was about a Month after I was examined, to the beſt of my Knowledge.

Mr. Mansfield. When was you examined?

Ann Pritchard. I cannot particularly ſay the Time, when ſhe was examined.

Mr.

Mr. Mansfield. Can you recollect how many Months ago?

Ann Pritchard. I cannot indeed; it might be a Year and an Half ago.

Mr. Mansfield. What did Mrs. *Cradock* say to you in that Converſation, which ſhe had with you, about her having heard or not having heard the Marriage Ceremony?

Ann Pritchard. She related her Examination before the Maſter in Chancery concerning her Grace's Marriage.

Mr. Mansfield. In that Converſation, did Mrs. *Cradock* ſay whether ſhe had or had not heard the Marriage Ceremony read?

Ann Pritchard. I never heard her relate any Thing concerning the Marriage Ceremony. I underſtand the Queſtion now: I did not before. She told me, ſhe did not hear the Marriage Ceremony.

Lord High Steward. Let the laſt Queſtion be aſked over again.

Mr. Mansfield. Whether Mrs. *Cradock* did or did not ſay to you, Mrs. *Pritchard*, that ſhe did or did not hear the Marriage Ceremony read?

Ann Pritchard. She told me, ſhe did not hear the Marriage Ceremony read.

Mr. Mansfield. Had you any Converſation with Mrs. *Cradock* about any Advantage which ſhe expected from this Proſecution?

Ann Pritchard. I had.

Mr. Mansfield. What did Mrs. *Cradock* ſay to you in that Converſation?

Ann Pritchard. She told me ſhe was to be provided for, but in what Manner ſhe could not ſay, till after the Affair was over, leſt it ſhould be deemed Bribery?

Mr. Mansfield. Did you hear any Thing more ſaid by Mrs. *Cradock* relating to that Subject?

Ann Pritchard. Not at that Time, but at another Time I have.

Mr. Mansfield. What did you hear from her at the other Time?

Ann Pritchard. I gave her an Invitation to come to ſee me. She told me, it would not ſuit her until this Affair was over; and then if ſhe ſhould get a good Fortune, ſhe might come and live with me.

Mr. Mansfield. Did you hear from Mrs. *Cradock* any Thing ſaid of any particular Proviſion to be made for her, or any Place to be got?

Ann Pritchard. Her Brother applied to my Huſband at the Cuſtom Houſe, deſiring him in caſe he heard of a Vacancy to let him know.

Mr. Attorney General. This is not Evidence in the Queſtion now propoſed. I know nothing of what will be brought; but this is not Evidence.

Mr. Mansfield. Nothing that paſſes, unleſs it comes home to Mrs. *Cradock*, will be Evidence to be ſure. The Witneſs muſt relate it in her own Manner.

Mr. Attorney General. I object to the Witneſs relating either in her own, or in any other Manner whatever, a Converſation to which Mrs. *Cradock* is not a Party.

Mr. Mansfield. It is under an Apprehenſion that it will come to Mrs. *Cradock*, or it would not be aſked.

Mr. Mansfield. Did you tell to Mrs. *Cradock* what you heard from her Huſband?

Ann Pritchard. I told her myſelf, that her Brother had been at the Cuſtom Houſe to deſire my Huſband, when there was a Vacancy in the Houſe, to let him know of it, as Mr. *Meadows* had promiſed to get him a Place.

Mr. Mansfield. What did Mrs. *Cradock* ſay to you upon your telling her this?

Ann Pritchard. She had never heard any Thing about it.

Mr. Mansfield. Did Mrs. *Cradock* ſay any Thing more to you about this Place?

Ann Pritchard. Her Anſwer was, it was more than ſhe knew, but that it would be equally the ſame.

Mr. Mansfield. What was meant by being equally the ſame?

Ann Pritchard. She thought her Brother was to provide for her out of it, or at leaſt allow her ſomething.

Mr. Attorney General. How long have you been acquainted with Mrs. *Cradock*?

Ann Pritchard. Five Years.

Mr. Attorney General. How long with the Priſoner?

Ann Pritchard. From the 2d of *February* laſt.

Mr. Attorney General. I wiſh to know whether any Body was preſent at any of the Converſations, which you had with Mrs. *Cradock*, but yourſelf.

Ann Pritchard. No.

Mr. Attorney General. I wiſh you would tell where they were?

Ann Pritchard. Once at my own Houſe at *Mile-End*.

Mr. Attorney General. At what Time was that Converſation held at your Houſe at *Mile-End?*

Ann Pritchard. It was on a *Sunday*, but I cannot particularly tell the Month.

Mr. Attorney General. How long ago was that *Sunday?*

Ann Pritchard. It was a very little Time after ſhe had been ſubpœnaed.

Mr. Attorney General. Do you know if it was a Week, or more Time, or leſs, after ſhe had been ſubpœnaed?

Ann Pritchard. It might be more than a Week. I cannot tell particularly.

Mr. Attorney General. What Reaſon have you to know, that it was within ſome ſhort Time after ſhe had been ſubpœnaed?

Ann Pritchard. As we were very intimate Acquaintances, ſhe came to dine with me. She told me, ſhe longed to tell me what had happened ſince the laſt Time ſhe ſaw me.

Mr. Attorney General. But how long was that laſt Time ſhe ſaw you before that laſt Time that ſhe came to you again?

Ann Pritchard. I cannot particularly ſay.

Mr. Attorney General. As near as you can go; was it a Fortnight?

Ann Pritchard. It might be a Quarter of a Year.

Mr. Attorney General. Have you any Means of recollecting within a Week or a Fortnight of the Time of her having been examined upon the Subpœna?

Ann Pritchard. I cannot poſſibly recollect, as not expecting ever to be called upon.

Mr. Attorney General. Does your Intimacy continue with Mrs. *Cradock?*

Ann Pritchard. It always did, until ſhe has been confined at Mr. *Beauwater*'s.

Mr. Attorney General. Did you ever mention this Converſation to Mrs. *Cradock*, ſince the Time it happened?

Ann Pritchard. No, never.

Mr. Attorney General. Will you give an Account to their Lordſhips of the whole Converſation which Mrs. *Cradock* held upon the Subject of that Marriage; whether ſhe told you the whole Story of the Marriage?

Ann Pritchard. She told me a great deal of it. I do not know the Particulars.

Mr. Attorney General. It is important, that you ſhould recollect as many Particulars as you can, that Mrs. *Cradock* told you of that Marriage. What Particulars did Mrs. *Cradock* tell you of that Marriage?

Ann Pritchard. She told me that ſhe had been examined by a Maſter in Chancery, who aſked her if ſhe knew of the Marriage between *Auguſtus John Hervey* and Miſs *Chudleigh?* They aſked her if ſhe was in the Church? ſhe anſwered, ſhe was. They aſked her who was in the Church? ſhe told them, herſelf, Mr. *Merrill*, and Mrs. *Hanmer*. They aſked her, if ſhe heard the Ceremony? ſhe told him, ſhe did not. That was all the Particulars I heard her relate.

Mr. Attorney General. Had not you the Curioſity yourſelf to enquire after ſome more Particulars?

Ann Pritchard. I had not.

Mr. Attorney General. Did ſhe ever tell you, at what Time of Night it was?

Ann Pritchard. Never.

Mr. Attorney General. Was any Body preſent at the Converſation about the Reward, that the Witneſs expected?

Ann Pritchard. No.

Mr. Attorney General. At what Time was that Converſation had?

Ann Cradock. It was after Dinner, it might be at Two o'Clock on the *Sunday*; it was Summer Time I know, but I cannot particularly ſay the Month.

Mr. Attorney General. Was it the ſame *Sunday*, that the former Converſation paſſed?

Ann Pritchard. No.

Mr. Attorney General. Whether, when the Witneſs propoſed, on her having a great Fortune coming to her, that ſhe ſhould live with Mrs. *Cradock*, or Mrs. *Cradock* live with her?

Ann Pritchard. Mrs. *Cradock* live with me!

Mr. Attorney General. What are you?

Ann Pritchard. In a very creditable Situation, and a pretty Fortune. I live at *Mile-End.*

Mr. Attorney General. Do you carry on any Buſineſs at *Mile-End?*

Ann Pritchard. No.

Mr. Attorney General. Are you married?

Ann Pritchard. Yes.

Mr. Attorney General. Has your Huſband any Buſineſs?

Ann Pritchard. Yes; a Place in the Cuſtom-Houſe.

Lord Groſvenor. What do you mean by Mrs. *Cradock*'s being confined at Mr. *Beauwater*'s?

Ann Pritchard. I went to enquire for her: I was not permitted to ſee her.

Lord Denbigh. I beg to know upon what Account you ſaw the Priſoner in *February* laſt?

Ann Pritchard. By an Invitation to her Houſe-keeper.

Lord Denbigh. Did you ſee the Priſoner herſelf at that Time.

Ann Pritchard. I did.

Lord Denbigh. What paſſed between you and the Priſoner?

Ann Pritchard. I cannot particularly relate it; nothing material.

Lord Denbigh. Did nothing paſs relative to this Trial?

Ann Pritchard. Nothing.

Lord Denbigh. Did nothing paſs relative to the Converſations between you and Mrs. *Cradock?*

Ann Pritchard. I do not recollect there was.

Lord Weymouth. I think the Witneſs has ſaid, that Mrs. *Cradock* told her that ſhe did not hear the Ceremony read; and Mr. *Cradock* has likewiſe told your Lordſhips, that ſhe was preſent when the Ceremony was read; I ſhould be glad to aſk whether Mrs. *Cradock* gave any Reaſon for not having heard the Ceremony? whether, that ſhe was at a Diſtance in the Church, or the Clergyman did not ſpeak loud enough?

Ann Pritchard. She was at too great a Diſtance in the Church.

Duke of Richmond. Did Mrs. *Cradock* tell you, that ſhe had in her Examination before the Maſter in Chancery ſaid, that ſhe did not hear the Ceremony read?

Ann Pritchard. She told me, ſhe did.

A Lord. The Counſel may produce that Examination.

Lord Camden. I have been aſking the ſame Queſtion, conceiving it would give Light to your Lordſhips, if it could be produced. I find that it is an Examination *de bene eſſe.* Publication is not made, and the Examinations are ſealed up.

Ordered to withdraw.

Mr. Wallace. My Lords, I ſhall call Witneſſes now to prove the Conſultation of Dr. *Collier*, and I ſhall follow that, my Lords, with a Proof of what Advice he gave to the noble Lady at the Bar and the Duke of *Kingſton* in the Preſence of a Witneſs I have to produce. My Lords, we have ſent, but find there is no Poſſibility of bringing Dr. *Collier*, or he ſhould have been here.—We will now call

Dr. WARREN, *who was ſworn in like Manner.*

Mr. Wallace. I wiſh Dr. *Warren* would inform your Lordſhips, whether he has lately ſeen Dr. *Collier.*

Dr. Warren. I viſited Dr. *Collier* Yeſterday, about Eight oClock in the Afternoon, and found him very ill under a Variety of Complaints, particularly a St. *Anthony*'s Fire in his Head and Face, by which One Side of it was ſo much ſwelled, that the Eye was almoſt cloſed up. It appeared to me that he could not venture out without great Hazard.

Mr. Attorney General. I beg Dr. *Warren* may be aſked, whether he thinks Dr. *Collier*'s Condition ſuch, that he could not ſtir out without Danger?

Dr. Warren. I ſaid ſo, my Lords.

Mr. Attorney General. What Sort of Danger do you mean, when you ſpeak of the Danger under which he would come out?

Dr. Warren. I think that he is in Danger; I cannot ſay that it would certainly kill him, but it would be very imprudent in me to adviſe him to come out.

Ordered to withdraw.

Mr. Mansfield. The Witneſs now intended to be produced to your Lordſhips is Mr. *Laroche.* The Purpoſe for which he is to be produced, is to tell your Lordſhips, that he ſaw Dr. *Collier* frequently with the Lady at the Bar and the late Duke of *Kingſton*, during the Suit in the Eccleſiaſtical Court: That he has himſelf heard Dr. *Collier* aſſure both the Parties, the late Duke of *Kingſton* and the Lady at the Bar, after that Sentence in the Spiritual

Spiritual Court, That they were perfectly free to marry, and might marry any one they pleaſed.

Mr. LAROCHE, *who was ſworn in like Manner.*

Mr. Laroche. Mr. Lords, I did not know, until within theſe few Minutes, that it would be neceſſary to call me. I will endeavour to recollect to the beſt of my Knowledge. I have got ſome Memorandums in my Pocket, and I hope I may be at Liberty to refer to them.

Lord High Steward. Are they in your own Writing?

Mr. Laroche. A Copy of it, and it has been in my Poſſeſſion ever ſince it was copied.

A Lord. Copied by his Deſire?

Mr. Laroche. Yes, from my own Notes, and in my Preſence, and has been in my own Cuſtody ever ſince.

Mr. Mansfield. Did you know the late Duke of *Kingſton?* and do you know Dr. *Collier?*

Mr. Laroche. Yes, I both knew his Grace the Duke of *Kingſton* and Dr. *Collier.*

Mr. Mansfield. Was you preſent at the Marriage of the Lady at the Bar and the Duke of *Kingſton?*

Mr. Laroche. I was.

Mr. Mansfield. Was Dr. *Collier* preſent alſo at the Marriage?

Mr. Laroche. He was.

Mr. Mansfield. Do you know, that Dr. *Collier* was conſulted by the Lady at the Bar and the Duke of *Kingſton,* while the Suit was depending in the Spiritual Court?

Mr. Laroche. I do know, that I have frequently walked with his Grace the Duke of *Kingſton* to Doctors Commons in a Morning to Dr. *Collier.* I have gone alſo with the Ducheſs in her Coach, and the Duke likewiſe, to Dr. *Collier.*

Mr. Mansfield. Has this happened frequently?

Mr. Laroche. Many Times.

Mr. Mansfield. Was you ever preſent with Dr. *Collier* and the Duke of *Kingſton* and the Lady at the Bar, after that Sentence had been given in that Court?

Mr. Laroche. I was ſeveral Times at Dr. *Collier*'s Chambers after the Suit had been determined.

Mr. Mansfield. Was you preſent when Dr. *Collier* gave to the Lady at the Bar, or the late Duke of *Kingſton,* or both of them, any Opinion concerning the Effect of that Sentence?

Mr. Laroche. I was many Times at Dr. *Collier*'s Chambers, and in Converſation I have heard Dr. *Collier* tell the Duke, That he might with Safety marry the Ducheſs of *Kingſton,* Miſs *Chudleigh,* as ſhe then was.

Mr. Mansfield. Have you heard that Opinion, or to that Effect, given more than once?

Mr. Laroche. I cannot be exact: I have heard it ſaid from Dr. *Collier* to the Duke.

Mr. Mansfield. Have you heard that ſaid alſo in the Preſence of the Lady at the Bar by Dr. *Collier?*

Mr. Laroche. I think I have, to the beſt of my Recollection. I went with the Duke of *Kingſton,* I breakfaſted with him, as well as I can recollect, the Morning that he was married; we then agreed to dine together at the *Thatched Houſe Tavern.* I went into the City with his Grace firſt of all to Dr. *Collier*'s to get the Licence. Dr. *Collier,* when we came there was not at home, but was gone to his Grace's Houſe with the Licence in his Pocket.

Mr. Mansfield. My Lords, Theſe are all the Queſtions I have to aſk Mr. *Laroche.*

Mr. Dunning. My Lords, I ſhould be glad to aſk Mr. *Laroche,* what the Occaſion was of taking theſe Opinions of Dr. *Collier?* whether it aroſe about any Doubt entertained by the Duke or the Lady, or both, whether they were at Liberty to marry?

Mr. Laroche. The Duke certainly had a Doubt upon his Breaſt, until the Suit of Jactitation was over. In conſequence of that Sentence, at the Decree of which I was preſent, and which declared her a ſingle Woman, he applied to Dr. *Collier* to know whether there was any Thing further to go on that might impede his Marriage? he was told, No, that ſhe was a ſingle Woman, and he might marry her.

Mr. Dunning. Were theſe Converſations pending the Suit, or after the Suit was determined?

Mr.

Mr. Laroche. The laſt Converſation was after the Suit was over; during the Time of the Suit, I have frequently, I ſuppoſe when I was in Town I walked Five Days out of Six into the City with the Duke, and then we called there to know how the Suit went on.

Mr. Dunning. Do you recollect, how long the Suit had been determined before the Marriage with the Duke of *Kingſton?*

Mr. Laroche. I ſhould think, to the beſt of my Recollection—I believe within Three Weeks. There were Fourteen Days to put in an Appeal; the Appeal was revoked, and I believe they married the Week after.

Mr. Dunning. Did the Duke's Doubt continue until the Day of the Marriage?

Mr. Laroche. He had no Doubt after he had applied for the Licence, and the Licence had been granted.

Mr. Dunning. What was the Occaſion of the Converſation, that paſſed upon the Morning of the Marriage between the Duke and Dr. *Collier?*

Mr. Laroche. There was no Converſation upon it as I remember between them upon the Morning of the Marriage.

Mr. Dunning. When did Dr. *Collier* inform the Duke, that he might marry?

Mr. Laroche. It was, I believe, after the Revocation of the Appeal—but it was after the Sentence was obtained.

Mr. Dunning. Will you be ſo good as to fix the Time as nearly as you can, when both theſe Converſations paſſed between Dr. *Collier* and the Duke, and Dr. *Collier* and the Ducheſs?

Mr. Laroche. As for aſcertaining a Time I cannot; but it was from the Meeting of the Parliament in the Month of *October* 1768. If I remember right, it was the Beginning of the Seſſions of Parliament before laſt; and during that Time I uſed often to walk with the Duke to Dr. *Collier*'s.

Mr. Dunning. How many Days was it before the Marriage, if I am miſtaken in ſuppoſing you ſaid, the Day of the Marriage?

Mr. Laroche. It might be Three or Four Days, or within a Week.

Mr. Dunning. Do you know, that Dr. *Collier* had been in Fact informed, that there had been a Marriage between the Lady and Mr. *Hervey?*

Mr. Laroche. I know nothing at all of that.

Mr. Dunning. Was you yourſelf informed at this Time, that there had been in Fact a Marriage between the Lady and Mr. *Hervey?*

Mr. Laroche. I never knew that there had been a Marriage.

Mr. Dunning. Had you been ſo informed, was my Queſtion?

Mr. Laroche. From Hear-ſay, and nothing elſe; I heard there was a Suſpicion of a Marriage, and that ſhe had put him upon the Proof of that Marriage, and that he had failed in his Proof.

Mr. Dunning. Had you, or had you not, been informed of the Marriage by the Lady herſelf?

Mr. Laroche. Never.

Mr. Dunning. Can you enable their Lordſhips to judge, what was the Occaſion that drew the Duke and Ducheſs to make this Application to Dr. *Collier*, ſo recently before the Marriage, and ſo long after the Sentence?

Mr. Laroche. I ſuppoſe, the Meaning of the Duke's going there was to aſk Dr. *Collier*, who had the whole Management of the Affair, whether he could with Safety marry the Ducheſs.

Mr. Dunning. Do you know whether any Body had or had not ſuggeſted a Doubt upon the Subject?

Mr. Laroche. There had been a Doubt before the Sentence, but after the Sentence there was no Doubt; but ſtill he thought proper to aſk him, becauſe there was an Appeal; that Appeal was revoked, and after that Appeal he married.

Mr. Mansfield. If your Lordſhips will permit me, I will aſk one Queſtion of Mr. *Laroche.* Whether in the Opinion that Dr. *Collier* gave to the Duke of *Kingſton* in his Hearing, Dr. *Collier* founded his Opinion upon the Effect of that Sentence which had paſſed?

Mr. Laroche. He certainly did, in my Conception of the Matter.

Mr. Dunning. I ſhould be glad to know, whether the Witneſs meant to have it underſtood upon what Dr. *Collier* founded his Opinion, that ſuch a Marriage, if it had been lawful, could be ſet aſide by thoſe Proceedings?

Mr. Laroche. The Words I heard were theſe: You may ſafely marry Miſs *Chudleigh*, my Lord, for you neither offend againſt the Laws of God or Man.

Lord Fauconbridge. After this had they any Doubt that they might lawfully marry?

Mr. Laroche. After the Sentence pronounced in the Eccleſiaſtical Court, I am firmly of Opinion, that neither of them had a Doubt as to the Legality of the Marriage.

Mr. Wallace. My Lords, I have many Witneſſes to prove Facts, which I believe will be admitted by the Gentlemen on the other Side, becauſe they have already been proved in another Place: They are ſuch, as the Lady at the Bar living continually in the State of a ſingle Woman, and tranſacting in that Character Matters of Conſequence relative to Property: They are already contained in Depoſitions in another Place, and I ſhall offer to your Lordſhips now that Sentence which has been pronounced in *Doctors Commons*; the Officer ſwears he brought it from *Doctors Commons*. Your Lordſhips are in Poſſeſſion of it.

Mr. Attorney General. I have already ſtated to your Lordſhips the Meaſure, which was obſerved in giving Evidence in that Caſe in *Doctors Commons*, both upon one Side and the other; and I ſtated the Meaſure obſerved upon the Part of the Priſoner in *Doctors Commons* to be that of her having given Evidence, that ſhe acted as a ſingle Woman in a great many Tranſactions.

Mr. Wallace. Then, my Lords, I call no more Witneſſes.

Lord High Steward. Mr. Solicitor General, you will pleaſe to reply.

Mr. Solicitor General. My Lords, The Cuſtom which has prevailed in Trials at your Lordſhips Bar, authorizes the Counſel on the Part of the Proſecution to obſerve upon the Evidence, that has been laid before your Lordſhips, and to apply that Evidence to the Charge. In the preſent Caſe, wiſhing to diſcharge my Duty as Counſel in a public Proſecution without the leaſt Degree of unneceſſary Severity, or occaſioning a momentary Reflection of Pain to the adverſe Party who ſtands at your Lordſhips Bar; reflecting on the whole Courſe of the Evidence that has been given; being in my own Mind ſo clearly convinced as I am, that the Evidence offered in Support of the Proſecution has not in the leaſt Degree been anſwered by any Evidence, that has been offered in Defence; but, on the contrary, that the Nature of the Defence attempted ſupports, confirms, and gives Credit to the Charge: I find nothing on which I could with Propriety obſerve in this Period of the Buſineſs at your Lordſhips Bar, but the Speech which has been made by the Priſoner in Defence. And, I truſt, your Lordſhips will think that it is in no Degree abandoning the Duty I owe unto the Credit and Weight of a public Proſecution, if I decline entering into Obſervations, in Reply to a mere argumentative Defence, offered to your Lordſhips by a Priſoner in Perſon. I therefore hope that your Lordſhips will think, that I have not failed in my Duty, in declining to Trouble your Lordſhips any further upon this Matter.

Mr. Solicitor General having finiſhed his Replication on the Part of the Proſecution, the Ducheſs of *Kingſton* was ordered from the Bar.

The Houſe was then adjourned to the Chamber of Parliament.

The Lords, and others, returned to the Chamber of Parliament in the cuſtomary Order, and after ſome Time, the Houſe was adjourned again into *Weſtminſter-Hall.*

The Peers being ſeated, the Lord High Steward in his Chair, and the Houſe reſumed, the Serjeant at Arms made Proclamation for Silence, as uſual.

Lord High Steward. Your Lordſhips have heard the Evidence, and every Thing that has been alledged on both Sides; and you have alſo heard the Opinion of the learned and reverend Judges upon the Queſtions ſtated to them; and the Solemnity of your Proceedings requires that your Lordſhips Opinions on the Queſtion of GUILTY or NOT GUILTY, ſhould be delivered ſeverally in the Abſence of the Priſoner, beginning with the junior Baron; and that the Priſoner ſhould afterwards be acquainted with the Reſult of thoſe Opinions by me. Is it your Lordſhips Pleaſure to proceed now to give your Opinions upon the Queſtion of GUILTY or NOT GUILTY?

Lords. Ay, ay.

Then the Lord High Steward ſtood up uncovered, and beginning with the youngeſt Peer ſaid,

John Lord Sundridge (Duke of *Argyle* in *Scotland*). What ſays your Lordſhip? Is the Priſoner GUILTY of the Felony whereof ſhe ſtands indicted, or NOT GUILTY?

Whereupon *John Lord Sundridge*, ſtanding up in his Place uncovered, and laying his Right Hand upon his Breaſt, anſwered,
GUILTY, upon my Honour.

In like Manner the ſeveral Lords aftermentioned, being all that were preſent, anſwered as followeth:

Henry Lord Digby. Guilty, upon my Honour.
Charles Lord Camden. Guilty, upon my Honour.
George Venables Lord Vernon. Guilty, upon my Honour.
Edward Lord Beaulieu. Guilty, upon my Honour.
John James Lord Lovel and Holland. Guilty, upon my Honour.
Thomas Lord Pelham. Guilty, upon my Honour.
Frederick Lord Boſton. Guilty, upon my Honour.
Nathaniel Lord Scarſdale. Guilty, upon my Honour.
Richard Lord Groſvenor. Guilty, upon my Honour.
William Lord Wycombe. Guilty, upon my Honour.
Thomas Lord Lyttelton. Guilty, upon my Honour.
William Lord Mansfield. Guilty, upon my Honour.
Horatio Lord Walpole. Guilty, upon my Honour.
Thomas Lord Hyde. Guilty, upon my Honour.
Vere Lord Vere. Guilty, upon my Honour.
William Lord Ponſonby. Guilty, upon my Honour.
Andrew Lord Archer. Guilty, upon my Honour.
Henry Lord Ravenſworth. Guilty, upon my Honour.
Matthew Lord Forteſcue. Guilty, upon my Honour.
Thomas Bruce Lord Bruce. Guilty, upon my Honour.
Edward Lord Sandys. Guilty, upon my Honour.
George Lord Edgecumbe. Guilty, upon my Honour.
Henry Frederick Lord Chedworth. Guilty, upon my Honour.
Francis Lord Godolphin. Guilty, upon my Honour.
Thomas Lord King. Guilty, upon my Honour.
Robert Lord Romney. Guilty, upon my Honour.
Thomas Lord Middleton. Guilty, upon my Honour.
Edmund Lord Boyle. Guilty, upon my Honour.
Charles Schaw Lord Cathcart. Guilty, upon my Honour.
William Lord Craven. Guilty, upon my Honour.
John Lord Clifton. Guilty, upon my Honour.
Henry Lord Paget. Guilty, upon my Honour.
George Lord Willoughby of Parham. Guilty, upon my Honour.
John Peyto Lord Willoughby de Broke. Guilty, upon my Honour.
George Lord de Ferrers of Cartley. Guilty, upon my Honour.
George Lord Abergavenny. Guilty, upon my Honour.
Francis Lord Le Deſpencer. Guilty, upon my Honour.
Charles Viſcount Maynard. Guilty, upon my Honour.
Thomas Viſcount Wentworth. Guilty, upon my Honour.
George Viſcount Torrington. Guilty, upon my Honour.
Frederick Viſcount Bolingbroke and St. John. Guilty, upon my Honour.
David Viſcount Stormont. Guilty, upon my Honour.
Thomas Viſcount Weymouth. Guilty, upon my Honour.
George Viſcount Townſhend. Guilty, upon my Honour.
Richard Viſcount Say and Sele. Guilty, upon my Honour.
Anthony Joſeph Viſcount Montague. Guilty, upon my Honour.
Edward Viſcount Hereford. Guilty, upon my Honour.
Wills Earl of Hillſborough. Guilty, upon my Honout.
John Earl Spencer. Guilty, upon my Honour.
Jacob Earl of Radnor. Guilty, upon my Honour.
Robert Earl of Northington. Guilty, upon my Honour.
Henry Earl Fauconberg. Guilty, upon my Honour.
Henry Earl of Darlington. Guilty, upon my Honour.
Philip Earl of Hardwicke. Guilty, upon my Honour.

Richard

Richard Grenville Earl Temple. Guilty, upon my Honour.
William Earl Fitzwilliam. Guilty, upon my Honour.
John Earl of Buckinghamſhire. Guilty, upon my Honour.
George Earl Brooke. Guilty, upon my Honour.
William Earl of Harrington. Guilty, upon my Honour.
Thomas Earl of Effingham. Guilty, upon my Honour.
John Earl of Aſhburnham. Guilty, upon my Honour.
John Earl Waldegrave. Guilty upon my Honour.
John Earl Ker. Guilty, upon my Honour.
Thomas Earl of Macclesfield. Guilty, upon my Honour.
Philip Earl Stanhope. Guilty, upon my Honour.
Henry Earl of Suſſex. Guilty, upon my Honour.
Heneage Earl of Aylesford. Guilty, upon my Honour.
Charles Earl of Tankerville. Guilty, upon my Honour.
William Earl of Strafford. Guilty, upon my Honour.
Edward Earl of Oxford and Earl Mortimer. Guilty, upon my Honour.
Niel Earl of Roſebery. Guilty, upon my Honour.
Hugh Hume Earl of Marchmont. Guilty, upon my Honour.
John Earl of Breadalbane. Guilty, upon my Honour.
George Earl of Dalhouſie. Guilty, upon my Honour.
John Earl of Loudoun. Guilty, upon my Honour.
John Earl of Galloway. Guilty, upon my Honour.
James Earl of Abercorn. Guilty, upon my Honour.
George James Earl of Cholmondeley. Guilty, upon my Honour.
George Buſſy Earl of Jerſey. Guilty, upon my Honour.
George William Earl of Coventry. Guilty, upon my Honour.
William Henry Earl of Rochford. Guilty, upon my Honour.
Richard Lumley Earl of Scarborough. Guilty, upon my Honour.
Other Earl of Plymouth. Guilty, upon my Honour.
Henry Earl of Gainſborough. Guilty, upon my Honour.
Frederick Auguſtus Earl of Berkeley. Guilty, upon my Honour.
Henry Earl of Doncaſter. Guilty, upon my Honour.
Frederick Earl of Carliſle. Guilty, upon my Honour.
William Anne Holles Earl of Eſſex. Guilty, upon my Honour.
John Earl of Sandwich. Guilty, upon my Honour.
Sackville Earl of Thanet. Guilty, upon my Honour.
George Earl of Winchelſea and Nottingham. Guilty, upon my Honour.
George Harry Earl of Stamford. Guilty, upon my Honour.
Baſil Earl of Denbigh. Guilty, upon my Honour.
Henry Earl of Suffolk and Berkſhire. Guilty, upon my Honour.
Francis Earl of Huntingdon. Guilty, upon my Honour.
Edward Earl of Derby. Guilty, upon my Honour.
Francis Seymour Earl of Hertford, Lord Chamberlain of the Houſhold. Guilty, upon my Honour.
William Earl Talbot, Lord Steward of the Houſhold. Guilty, upon my Honour.
Charles Watſon Marquis of Rockingham. Guilty, upon my Honour.
Hugh Duke of Northumberland. Guilty, upon my Honour.
Henry Fienes Pelham Duke of Newcaſtle. Guilty Erroneouſly, but not Intentionally, upon my Honour.
Francis Duke of Bridgewater. Guilty, upon my Honour.
John Frederick Duke of Dorſet. Guilty, upon my Honour.
James Duke of Chandos. Guilty, upon my Honour.
George Duke of Mancheſter. Guilty, upon my Honour.
William Henry Cavendiſh Duke of Portland. Guilty, upon my Honour.
Alexander Duke of Gordon. Guilty, upon my Honour.
George Duke of Marlborough. Guilty, upon my Honour.
William Duke of Devonſhire. Guilty, upon my Honour.
Harry Duke of Bolton. Guilty, upon my Honour.
George Duke of St. Albans. Guilty, upon my Honour.
Henry Duke of Beaufort. Guilty, upon my Honour.
Auguſtus Henry Duke of Grafton. Guilty, upon my Honour.

Charles

Charles Duke of Richmond. Guilty, upon my Honour.
William Earl of Dartmouth, Lord Privy Seal. Guilty, upon my Honour.
Granville Leveſon Earl Gower, Lord Preſident of the Council. Guilty, upon my Honour.
His Royal Highneſs Henry Frederick Duke of Cumberland and Strathern. Guilty, upon my Honour.

Then the Lord High Steward, ſtanding uncovered at the Chair, laying his Hand upon his Breaſt, ſaid,

Lord High Steward. My Lords, I am of Opinion that the Priſoner is GUILTY, upon my Honour.

Lord High Steward. My Lords, All your Lordſhips have found the Priſoner Guilty of the Felony whereof ſhe ſtands indicted, One Lord only excepted; who ſaid, that ſhe was Guilty—" *erroneouſly*, but *not intentionally*:" Is it your Lordſhips Pleaſure that ſhe ſhould be called in and acquainted therewith?

Lords. Ay, ay.

Proclamation was then made for the Deputy Uſher of the Black Rod to bring her Grace the Ducheſs of *Kingſton* to the Bar; which was done. Afterwards Proclamation was made for Silence, as uſual.

Lord High Steward. Madam, The Lords have conſidered the Charge and Evidence brought againſt you, and have likewiſe conſidered of every Thing which you have alledged in your Defence; and, upon the whole Matter, their Lordſhips have found you Guilty of the Felony whereof you ſtand indicted. What have you to alledge againſt Judgment being pronounced upon you?

The Ducheſs of Kingſton *delivered a Paper, wherein her Grace prayed the Benefit of the Peerage according to the Statutes.*

Then his Grace the Lord High Steward aſked the Counſel for the Proſecution, whether they had any Objection to the Ducheſs's Claim of the Benefit of the Peerage?

Mr. Attorney General. My Lords, Not expecting to be called upon, I did not attend to the Form of Words uſed by the Priſoner——However I underſtand, that ſhe claims the Benefit of the *Statutes*; not confining herſelf, I ſuppoſe, in the Form of her Claim, to *one* Statute; but, alledging herſelf to be a Peereſs, claims the Benefit of *both*; meaning to inſiſt, that the Act, which exempts Women from Judgment of Death, is to be conſtrued with Reference to that, which allows Clergy to Lords of Parliament.

My Lords, Upon this Claim I ſuppoſe Two Queſtions will naturally ariſe; One, whether it be competent in her Situation to claim *that* Judgment, or an analogous Judgment to *that*, which would have been pronounced upon a Lord in Parliament convicted of the like Offence; the other, what would be the Extent, or poſſible Extent of *that* Judgment upon a Lord of Parliament, ſo convicted.

My Lords, I ſpeak to both theſe Queſtions; becauſe I conceive, that, without aggravating the Offence, I may fairly aſſume, that all the Qualifications, which were put upon it, have been fully and effectually proved; the Marriage; the Iſſue of that Marriage; the Fraud upon publick Juſtice; the additional Aggravation, that it was no leſs a Surprize upon the Duke of *Kingſton*, than a Scandal to the Reſt of the World.

This being the true State of the Caſe, it muſt occur to every noble Lord's Mind, that the Laws of this Country would be conſiderably diſgraced, if it were poſſible to ſtate to ſuch a Court ſuch a Crime, attended with all its Circumſtances and Qualifications, as an Object of perfect Impunity.

In this Point of View, I ſhall take it for certain, that, if I can eſtabliſh in the Judgment of your Lordſhips my own firm Perſuaſion, that this Claim to avoid Judgment of Death cannot be made under the Statute of *Edward* VI. or with any Reference to it, but muſt reſort to the Act of *William* and *Mary*, I ſhall then have laid before your Lordſhips that Opportunity, which Juſtice, undoubtedly, will be deſirous to lay hold on, of pronouncing a Judgment ſomewhat more adequate to the Offence; though perhaps, in the Opinion of many, far enough from adequate. Or, if, contrary to my preſent Thoughts, ſhe may claim any Benefit from the Firſt Statute, yet the Act of *Elizabeth* will enable your Lordſhips to make ſome ſlight Satisfaction to the Law for ſo enormous a Violation of it.

My Lords, This I take to be a clear Propoſition, that, from the Beginning of Time to this Hour, *Clergy* was never demandable by *Women*. By the ancient Law of the Land this Privilege was ſo favourably uſed, that, Reading was ſufficient Proof of Clergy; and all were taken to be Clerks, who lay under no *indiſpenſable Impediment* to receive Orders. This Rule is laid down in all the Books. Several Statutes, nay the provincial Conſtitution of 1531, adopt the Diſtinction thus made between Perſons in Holy Orders, and *other* Clerks, or *Lay* Clerks. But Women were under this *indiſpenſable Impediment*. They might be profeſſed, and become religious; but even a Nun could not claim this Privilege. This is proved by the ſame Books: And Lord *Hale* puts the Caſe of Manſlaughter; where the Huſband ſhall have his Clergy, and the Wife no Privilege. The Statutes, which exempt Women from Judgment of Death, expreſly recite, that they were not intitled to Clergy; and diſtinctly provide a new and different Species of Exemption.

Having reminded your Lordſhips of this clear Rule in the Law, I ſhall take up the Statutes, which are material to this Argument, in their Order of Time. This will lead me to conſider; Firſt, what is the true Nature and Extent of that Exemption from capital Puniſhment, which his Clergy gives to a Lord of Parliament, by the Firſt of *Edward* the Sixth, and the Eighteenth of *Elizabeth*; Secondly, whether the Twenty-firſt of *James*, or the Third and Fourth of *William* and *Mary* contain any Reference to thoſe other Laws.

In order to explain the true Effect of the Statute of *Edward* the Sixth, I ſhall conſider the Situation, in which the Peerage ſtood with reſpect to Clergy, at the Time of making it. I ſay the Situation of the Peerage as to Clergy; becauſe it will not be doubted, I ſuppoſe, that they were intitled to this valuable Privilege in common with others. So peculiar and cruel a Diſtinction could not have remained in perfect Silence for ſuch a Number of Years. Nor, if they had been intitled to claim it upon peculiar Terms, would thoſe have been unnoticed. Beſides, if there be no Evidence of ſuch a Privilege at *any Time*, how can it be claimed *now?*

Although the Allowance of Clergy was ſetting aſide the Conviction as to the Perſon of the Offender, his Goods remained forfeit, and the King ſeized his Lands under the Record. By the 4th of *H.* VII. c. 13, it was to be allowed but once; and the Convict was to be branded in open Court, before the Judge. And in the very Year of the Statute now under Conſideration a long Liſt of Offences was deprived of it; and, even where it remained, Slavery, with an Iron Yoke, was inflicted on the Convict, as a Vagabond.

It was thought too much to leave the Lords of Parliament expoſed to thoſe cruel and ſhameful Stigmata; eſpecially in Caſes, where they might make Purgation, and ſo be reſtored to the Exerciſe of their high Functions. Nay in ſuch Inſtances even Forfeiture was thought too much. It was alſo conceived by their Lordſhips, that, in their Caſe, capital Puniſhment had extended too far. It was alſo thought proper to deliver a Lord of Parliament from the Neceſſity of proving his Title to Clergy in the ordinary Way. Therefore, by the 1 *E.* VI. c. 12, ſ. 14, it was enacted, "That in all and every Caſe and "Caſes, where any of the King's Majeſty's Subjects ſhall and may, upon his Prayer, "have the Privilege of Clergy, as a Clerk Convict, that may make Purgation; in all "thoſe Caſes and every of them, and alſo in all and every Caſe and Caſes of Felony, "wherein the Privilege and Benefit of Clergy is reſtrained, excepted, or taken away by "this Statute or Act (wilful Murder and poiſoning of Malice prepenſed only excepted) "the Lord and Lords of the Parliament, and Peer and Peers of the Realm, having "Place and Voice in Parliament, ſhall, by virtue of this preſent Act, of common Grace, "upon his or their Requeſt or Prayer, alledging that he is a Lord or Peer of this Realm, "and claiming the Benefit of this Act, though he cannot read, without any Burning in the "Hand, Loſs of Inheritance, or Corruption of his Blood, be adjudged, deemed, taken, "and uſed, for the Firſt Time only, to all Intents, Conſtructions, and Purpoſes, as a Clerk "Convict, and ſhall be in Caſe of a Clerk Convict, which may make Purgation, without "any further or other Benefit or Privilege of Clergy to any ſuch Lord or Peer from thence-"forth at any Time after for any Cauſe to be allowed, adjudged, or admitted; any Law, "Statute, Uſage, Cuſtom, or any other Thing to the contrary in any-wiſe notwithſtanding." More ſhortly thus—At preſent, Men prove their Clergy by Reading; and muſt forfeit, and be branded, before it may be obtained. For the future, in all Caſes, where any of the King's Subjects may now obtain Privilege, as a Clerk Convict, who may make Purgation, a Lord of Parliament, without Reading, Burning, or Forfeiture, ſhall be adjudged, and uſed as, a Clerk Convict, who may make Purgation. All, that was harſh in the Law, was taken off the Peerage: All, that was left, was Privilege. The Trial by the Biſhop and his Clerks (which differed from Trial by Peers, no more in the Caſe of a Lord, than of a Com-

moner) was not ſubſtituted in the Place of legal Trial, but ſuperadded to it, for his Advantage. This was the only Way, which had then been thought of, in any Caſe, to avoid Judgment of Death. The Reaſon of the Thing, and the expreſs Letter of the Statute unite to prove, that, till the Eighteenth of *Elizabeth*, a Lord of Parliament, convicted of a Clergyable Crime, and being capable of Purgation, muſt have been deemed and treated as a Clerk Convict, who might make Purgation, and delivered over to the Ordinary for that Purpoſe.

The learned and laborious *Staunford*, our ableſt Writer, at leaſt on this Branch of the Law, treats it as a Thing without Queſtion, Fol. 130, *A Lord ſhall have Privilege of Clergy, where a common Perſon ſhall not have it. He ought to make Purgation; and, if ſo, he muſt be delivered to the Ordinary, to be kept, till he has made his Purgation. If he confeſſes, abjures, or is outlawed, he cannot have the Benefit of this Statute; becauſe he cannot make Purgation.* *Staunford* flouriſhed when this Statute was made; wrote a few Years after; and died before the Eighteenth of *Elizabeth*. His therefore is a contemporary Expoſition of it, unentangled with the caſual Phraſe of any ſubſequent Act.

Hale, in his Second Volume, Fol. 376, where he ſeems to differ from *Staunford*, as to the Extent of the Statute, agrees with him as to the Nature of the Privilege; which he calls *The Clergy of Noblemen*. At one Time, Judges would not deliver Clerks to the Ordinary, who had become incapable of Purgation, by Confeſſion, or otherwiſe. The Church alledged, that nothing done before an unlawful Judge was ſufficient to ſuſtain their Proceſs, or Sentence. Whereupon the *Articuli Cleri* provided, that all Clerks ſhall be delivered to their Ordinaries. But they were delivered, in the Inſtances mentioned by *Staunford*, *abſque Purgatione faciendâ*. Now the Caſe put in the Statute is, where *any Man* may have the Privilege of Clergy, as a Clerk Convict, *that may make Purgation*. And a Lord of Parliament, being in the ſame Predicament, was put in the Caſe of a *Clerk Convict that may make Purgation*, without Reading or undergoing the Pains, which attended a Commoner under thoſe Circumſtances. *Staunford* therefore thought, that theſe Exemptions did not reach to the Caſe, where, before the Statute, there could be *no Purgation for any Man*. And the Opinion was ſo probable, at leaſt, that a very eminent Lawyer, of unexceptionable Character, in the Time of the great Rebellion, actually burnt a Peer, who confeſſed. *Hale* doubts; *eſpecially at this Day, when Delivery to the Ordinary and Purgation are both taken away by the Eighteenth of* Elizabeth. It is not obvious what Difference that makes. *I think*, ſays he, *it was never meant, that a Peer of the Realm ſhould be put to read, or be burnt; where a common Perſon ſhould be put to his Clergy.* Both agree, that the Peer ſhould have had his Clergy, and have been delivered to the Ordinary, and have made Purgation, —exempt from the concomitant Penalties; *in ſome Caſes*, ſays *Staundford*; *in all*, ſays *Hale*. But even *Hale* makes no Doubt of Peers being liable to Impriſonment.

In the Trial of Lord *Warwick*, the Chief Juſtice lays it down, *That the Statute of* Edward VI. *exempted Peers from the Penalty of Burning, and repealed the Statute of* Henry VII. *as to ſo much*. Then a Peer was liable to Burning before; and by the Act of *Henry* VII. which, in Terms, puts it upon *Perſons admitted to their Clergy*. But how could it be ſeriouſly agued, that a Thing ſo anxiouſly repealed never exiſted?—I have conſulted on this Occaſion as many Books, as I could think of referring to; and I don't recollect One, which ſuppoſes a Time, when a Peer had not the Benefit of his Clergy.

Nothing, it muſt be confeſſed, could be more unprincipled, and incongruous, than to ſuffer the Truth or Juſtice of a Conviction at Common Law to be queſtioned in the Eccleſiaſtical Court. But the Church had not then loſt its Hold upon Mens Minds; nor would, probably, for ſome Ages, but for its own glaring Miſconduct.

The Trial, called Purgation, as it was had in the Biſhops Court, was a ridiculous Mockery of Juſtice; or became ſerious, only by the Perjury, which it produced. It was therefore aboliſhed. But ſimply to aboliſh it would alſo have cut off that Impriſonment, which followed a Conviction in the Biſhops Court, and which (it ſhould have been preſumed) would always follow actual Guilt. To remedy which, it was thought fit to give the Court Authority to puniſh by Impriſonment for any Time leſs than a Year. This was proper in all Caſes; but particularly ſo in the Caſes of Peers, and Perſons in holy Orders, who were not liable to Burning in the Hand. It was therefore enacted by the Eighteenth of *Eliz.* c 7, ſ. 2, and 3, "That every Perſon and Perſons, which at any Time, after this pre-
"ſent Seſſion of Parliament, ſhall be admitted and allowed to have the Benefit or Privi-
"ledge of his or their Clergy, ſhall not thereupon be delivered to the Ordinary, as hath
"been accuſtomed; but, after ſuch Clergy allowed, and Burning in the Hand according
"to the Statute in that Behalf provided, ſhall forthwith be enlarged, and delivered out
"of

" of Priſon, by the Juſtices, before whom ſuch Clergy ſhall be granted, that Cauſe notwith-
" ſtanding."

" Provided, nevertheleſs, and be it alſo enacted, That the Juſtices, before whom ſuch
" Allowance of Clergy ſhall be had, ſhall and may, for the further Correction of ſuch Per-
" ſons, to whom ſuch Clergy ſhall be allowed, detain and keep them in Priſon, for ſuch
" convenient Time, as the ſame Juſtices in their Diſcretion ſhall think convenient; ſo as
" the ſame do not exceed one Year's Impriſonment; any Law or Uſage, heretofore had
" or uſed, to the contrary notwithſtanding."

The Effect of theſe Words, *ſhall forthwith be enlarged and delivered out of Priſon, that Cauſe notwithſtanding*, is to give the Perſon ſo enlarged exactly the ſame State and Condition, which he would have obtained, under the former Diſpenſation of Law, by going through the Proceſs of Purgation, and ſo being delivered from the Offence. This Part of the Act carries a great Effect upon the Conſtruction of the Whole. In Converſation, I have heard the Words, *after Burning in the Hand*, ſuppoſed to be the Phraſe, upon which ſome Doubt might turn, whether Peers are included in the Act. But, in the Conſtruction of ſuch a Statute, it is not enough to find a Phraſe, upon which ſome Doubt might turn. It would be fitter for thoſe, who conceive the Doubt, to proceed at leaſt One Step further; and ſtate, to what Extent their Doubt goes. Is it doubted, whether Purgation be taken away in the Caſe of a Peer, and the Peer be reſtored to his Law without it? Will any Gentleman argue, that, at this Day, a Peer convicted of a Clergyable Crime, ſhall not be forthwith enlarged; but muſt be delivered to the Ordinary to make his Purgation? This Point, I believe, never has, nor ever will be argued. If he is not to undergo Purgation, *quo Jure* is he exempt? Does any other Statute exempt a Peer from his Purgation, or diſcharge him from his Attainder, but this general Statute of the Eighteenth of *Elizabeth*; which, in its large Phraſe, comprehends every Body? I proteſt I know of none. Or, does this Statute exempt any, but thoſe, who ſhall be thereafter *admitted to Clergy?* The Words, *after Burning in the Hand*, do not make an eſſential or neceſſary Article in the Deſcription of the Perſons to be diſcharged; nor create any Term, or Condition, upon which the Diſcharge is to obtain. The Deſcription of the Perſons to be diſcharged is abſolved in theſe Words, *all Perſons who ſhall be allowed the Benefit of their Clergy*. They are to be diſcharged abſolutely. But when? and in what Manner? why, after the Allowance of Clergy, and Burning in the Hand *according to the Statute*; which is to ſay, in the Caſes provided by the Statute; of which the Caſe of a Peer is not one.

The whole Conſequence is no more than this, that, in a Caſe circumſtanced like the preſent, where the Honour of the Law, and the Purity of Manners require ſome Example to be made, your Lordſhips may follow the Bent of your Diſcretion, by reſorting to the laſt Clauſe in the Eighteenth of *Elizabeth*. This I ſay, upon a Suppoſition, that ſome Peer ſtood convicted of the like Offence, with ſimilar Aggravation; or that, upon the Reſt of the Argument, it will be poſſible to give any Woman the Benefit of any Statute, *pari ratione*, as Peers have the Benefit of Clergy, under the Firſt of *Edwrad* VI. But I hope to prove ſoon, that it is impoſſible to conſtrue the ſubſequent Statute in that Manner. Conſequently there will be due to this Crime a very different Sort of Puniſhment, than that, which I have alluded to.

It will hardly be ſaid, that theſe Statutes relate to Women of any Condition. The Expreſſion excludes them diſtinctly enough. If that had been more general, the Subject Matter excludes them abſolutely. They are no more Clerks, than Lords of Parliament. They never underwent Purgation; nor were delivered to the Ordinary; they were therefore incapable of receiving theſe Privileges: For theſe Acts were merely to regulate an old Right, not to give a new one. Both the Statutes, which give them their Exemption, recite it as a general Propoſition, that Women were not intitled to Clergy. Nor have I even ſeen any Statute, Caſe, or Book, wherein any Condition of Women is ſuppoſed exempt, but by virtue of the Laws, I ſhall ſtate preſently. It remains then to be conſidered, whether the Exemption, provided by thoſe Laws, has any Reference to the Statute of *Edward* VI.

The Firſt Statute, which exempts Women from capital Puniſhment in any Caſe of Felony, is the Twenty-firſt of *James* I. c. 6, which runs thus; " Whereas, by the Laws of
" this Realm, the Benefit of Clergy is not allowed to Women convicted of Felony; by
" reaſon whereof many Women do ſuffer Death for ſmall Cauſes; be it enacted by the
" Authority of this preſent Parliament, that any Woman, being lawfully convicted by
" her Confeſſion, or by the Verdict of Twelve Men, of, or for the felonious Taking
" of any Money, Goods, or Chattels above the Value of Twelve Pence, and under

" the

" the Value of Ten Shillings; or as Acceſſary to any ſuch Offence; the ſaid Offence " being no Burglary, nor Robbery in or near the Highway, nor the felonious " taking of any Money, Goods, or Chattels, from the Perſon of any Man or Wo- " man privily, without his or their Knowledge, but only ſuch an Offence, as in the " like Caſe a Man might have his Clergy, ſhall, for the Firſt Offence, be branded, " and marked in the Hand, upon the Brawn of the Left Thumb with a hot burning Iron, " having a Roman T upon the ſaid Iron; the ſaid Mark to be made by the Gaoler, " openly, in the Court, before the Judge; and alſo to be further puniſhed by Impriſon- " ment, Whipping, Stocking, or ſending to the Houſe of Correction, in ſuch Sort, Man- " ner, and Form, and for ſo long Time (not exceeding the Space of One whole Year) as " the Judge, Judges, or other Juſtices, before whom ſhe ſhall be ſo convicted, or which " ſhall have Authority in the Cauſe, ſhall, in their Diſcretion, think meet, according to the " Quality of the Offence, and then to be delivered out of Priſon for that Offence; any " Law, Cuſtom, or Uſage to the contrary notwithſtanding."

This Statue, at leaſt, excludes all Colour of Reference to the Firſt of *Edward* VI. Any Woman convicted of Grand Larceny (if it be but a ſimple Felony, Clergyable in a Man) ſhall be burnt. She was not put to demand Benefit of the Statute; to pray her Clergy would have been too abſurd; but, the Larceny being ſtated in the Record to be committed by a Woman, Judgment was forthwith entered of Burning, and ſo forth. The Statute is, moreover, confined to ſuch Larcenies, where, *in the like Caſe*, a Man might have his Clergy. I take Notice of theſe Words at preſent, only for the Sake of remarking that, in this Statute, at leaſt, they muſt relate to the Quality of the Offence, not to the Condition of the Offender.

My Lords, The only Statute, of which the Priſoner can claim the Benefits againſt Judgment of Death, is the Third and Fourth of *William* and *Mary*, c. 9, ſ. 6, which runs in theſe Words; " And whereas, by the Laws of this Realm Women convicted of Felony, " for ſtealing of Goods, and Chattel of the Value of Ten Shillings, and upwards, and " for other Felonies, where a Man is to have the Benefit of his Clergy, are to ſuffer Death; " be it therefore enacted and declared by the Authority aforeſaid, That, where a Man, " being convicted of any Felony, for which he may demand the Benefit of his *Clergy*, if " a Woman be convicted for the ſame or like Offence, upon her Prayer to have the Be- " nefit of *this Statute*, Judgment of Death ſhall not be given againſt her upon ſuch Convic- " tion; or Execution awarded upon any Outlawry for ſuch Offence; but ſhall ſuffer the " ſame Puniſhment, as a Man ſhould ſuffer, that has the Benefit of his Clergy allowed " him, in the like Caſe; that is to ſay, ſhall be burnt in the Hand by the Gaoler, in open " Court, and be further kept in Priſon for ſuch Time as the Juſtices in their Diſcretion " ſhall think fit, ſo as the ſame do not exceed one Year's Impriſonment." Under this Act, to avoid Judgment of Death, the Priſoner muſt pray the Benefit of this Statute.

I collect from Converſation, perhaps too idle to be referred to, that the Argument will be laid thus. A Woman Convict of a Felony, which would be Clergyable in a Man, ſhall ſuffer the ſame Puniſhment, as a Man would do *in the like Caſe*, that is, as a Man *of the ſame Condition* with herſelf: But a Peer would ſuffer no Puniſhment: Therefore a Woman *of that Condition* ſhall ſuffer none.

The Words, *in the like Caſe*, muſt mean the ſame here, as in the Twenty-firſt of *James*, *convicted of the like Offence*. And the Words, *of the ſame Condition* muſt be wholly ſuperadded, if they are admitted at all. But it is impoſſible to conceive, that, if the Legiſlature had meant to create ſo important a Diſtinction between different Orders of Women, it would have uſed no Words for that Purpoſe. Nor, indeed, can ſuch a Diſtinction be ſo created by any Operation of Law.

If, in Favour of the Priſoner, the ſlighteſt Degree of Puniſhment, which *any* Man can ſuffer *in the like Caſe*, is to be intended, *every* Woman would claim Exemption from Burning, becauſe inferior Eccleſiaſticks are not burnt; and from Forfeiture, becauſe Lords of Parliament are neither burnt nor forfeit. But this abſurd Conſtruction happens to be thrown out by the Act itſelf, which appoints the Puniſhment, it means, to be Burning and Impriſonment. The Statute therefore will not ſuffer it to be underſtood, that any Woman, convicted of any Felony, ſhall ſuffer no other Puniſhment, than thoſe who, it is now contended, are to ſuffer no Puniſhment at all.

Upon theſe Grounds I ſubmit to your Lordſhips, that the Judgment, to be pronounced upon every Woman, of whatever Quality or Denomination, is that, which is preſcribed by

the Third and Fourth of *William* and *Mary*; and that there is no Ground or Warrant of Law to inſiſt, that a Peereſs can avoid Judgment of Death upon any other Terms.

My Lords, The whole Queſtion is upon *Burning*. The *Impriſonment* is the ſame either Way. Now, if there be Prudence or Propriety of any Sort in eſtabliſhing ſuch an Exemption for Peereſſes, let that Prudence or Propriety be ſtated, where by the Conſtitution of this Country ſuch an Application ought to be made to Parliament. If the Parliament ſhould think fit to create new Privileges, or add new Diſtinctions to any Order of Men, or Women, they are competent to do it. But it would be aſſuming too much for any Court of Juſtice. Your Lordſhips ſit here merely as a Court of Juſtice, not as a Houſe of Legiſlature. To do that by forced and arbitrary Interpretation of Law, which ought only to be done by Act of Legiſlature, is too much enhancing the Prerogative of the Judge; and too much confounding thoſe Authorities, which ought to have plainer Marks and broader Limits ſet between them.

Mr. Wallace.

My Lords, I did not ſuppoſe it would have fallen to my Share to give your Lordſhips any Trouble upon this Subject; and therefore I have not very lately looked into the Statutes which have been mentioned; but I will ſtate to your Lordſhips in general, what I underſtand to be the Privilege of Peereſſes at this Day.

By the 20th *Hen.* VIth. Chap. 9. to obviate Doubts which had ariſen upon *Magna Charta*, Peereſſes are put upon a Footing with Peers with reſpect to Trial and Puniſhment; and by an equitable Conſtruction, Peereſſes by Titles ſince created, as Marchioneſſes and Viſcounteſſes, are within the Act.

At the Time of paſſing the Act of *Edward* the VIth the Lords of Parliament are mentioned, which at that Time of Day comprehended the whole Peerage. In this Situation were Peers at the Time of paſſing the Statute of the 18th of *Elizabeth*, which Statute cannot relate to them. Every Perſon, who is to be admitted or allowed to have the Benefit or Privilege of Clergy, ſhould not after burning in the Hand be delivered to the Ordinary, as has been cuſtomary, but may be detained in Priſon. This Proviſion clearly refers to the Situation of Commoners, and not of Peers: It refers to thoſe who were at the Time of making the Act liable; whereas Peers were not in that Condition; they were not to pray their Clergy, but the Benefit of that Act, and to be delivered out without burning in the Hand. The Direction given by the Act is to Juſtices; an Expreſſion never applied, I believe, in any Act to the Lords in Parliament ſitting in their Judicial Capacity as a Criminal Court: The Juſtices are to keep ſuch Perſons in Priſon after they are burnt in the Hand; which is a Demonſtration that inferior Courts are alluded to; and it is under this Statute Impriſonment is inflicted upon Perſons intitled to their Clergy.

At the Time of paſſing the Statute of the 3d and 4th of *William* and *Mary* Peers were exempt from burning in the Hand and Impriſonment in Clergyable Caſes, which Commoners were ſubject to. By this Law Women are put on the ſame Footing with Men, and the Courts before whom they are tried are to inflict the ſame Puniſhment as they are authorized to do upon Men. Theſe Proviſions make it, in my Apprehenſion, extremely clear, that the Peereſſes were intended to be placed in the ſame Condition with Peers, as they were by *Magna Charta*, explained by the Statute of *Edward* the VIth. Would it not be the moſt harſh and cruel Interpretation, if the Act was even doubtful, to ſubject a Peereſs to a Puniſhment for the ſame Crime which her Huſband is exempt from? The Conditions of Perſons create Diſtinctions in the Conſtruction of Laws; but the Attempt now made is to confound all Ranks, and by ſuppoſed literal Interpretation to involve one of your Lordſhips own Situation in the Puniſhment, which the Legiſlature has been ſo anxious to extricate you from.

Mr. Mansfield.

It is not till this Moment, that I had any Apprehenſion myſelf, that any Queſtion of this Sort would be agitated before your Lordſhips, and therefore I can only ſpeak of the ſeveral Statutes referred to from my general Memory of them; but I apprehend that the Conſtruction of theſe Statutes will not, cannot be ſuch as is now contended for on the Part of the Proſecutor. The Object of the Conſtruction wiſhed by the Proſecutor is this, that the Laws of this Country are to make a Difference between one Sex and the other; that they are now at this Time of Day to be ſo determined as to inflict a more ſevere, a more cruel Puniſhment upon a Woman than on a Man, though the Offence committed be the ſame.

Now, ſuch a Conſtruction your Lordſhips would never ſuffer, nor any Court of Juſtice in this Country would ſuffer to take Place, unleſs there ſhould ſomething be found in the Law which neceſſarily requires it: And taking the ſeveral Statutes together relating to this Subject, I apprehend your Lordſhips will be of Opinion, that theſe Statutes do not only not require, but that they exclude, ſuch Abſurdity, ſuch Inhumanity.

My Lords, The Statute upon which the Whole muſt be founded, as I conceive, is that of the 20th of King *Henry* the VIth which, as well as I recollect from my Memory, is Chap. 11, which firſt provides expreſsly, though I believe it is conſidered only as a Declaration of the Common Law, but provides, that Peereſſes, ſhould be tried, and, if I recollect the Words rightly, ſhould not only be tried, but ſhould be judged in the ſame Manner as Peers; and remembering what has happened upon that Statute, I muſt put your Lordſhips in Mind, that ſuch has been the Benignity of the Conſtruction upon it, that though only Three Ranks of Peereſſes are named, it has been clearly held in Conſtruction to extend to all. The Three that are mentioned, I think, are Ducheſſes, Counteſſes, and Baroneſſes; the Conſtruction is, that it extends to Marchioneſſes and Vicounteſſes, becauſe they are intitled in the Spirit and Meaning of the Law to the ſame Privilege, which is given to the other Ladies by Name. The clear Reſult and Effect of this Statute is, to ſay in general Terms, that Women of that high Rank ſhould be tried and ſhould be judged in the ſame Manner as Men. The Terms uſed in the Act are general. Whoever reads that Law, will be aſtoniſhed to hear any Man contending, that in impoſing Judgment upon a Peereſs your Lordſhips are to be guided by a different Rule from that, which you would follow if you were paſſing Judgment upon a Peer. The next Statute to be conſidered after this, as a general Statute upon the Subject, is that of the 3d and 4th of King *William* the Third. Did that Statute mean; were the Legiſlators that made it ſo forgetful of what was due to Humanity, and to themſelves and their own Characters, as to mean, that a Diſtinction in Puniſhment ſhould prevail between one Sex and the other to the Prejudice of that, which is intitled to the greater Indulgence and Compaſſion? Moſt certainly not; becauſe the expreſs Proviſion of that Statute is, that Women convicted of Offences intitled to the Benefit of Clergy ſhould ſuffer in the ſame Manner as Men would ſuffer convicted of the ſame Offences.

My Lords, No Man, who can read that Statute, and reaſon upon it, can help concluding that it was the Object of that Law to ſay, that where Women were convicted of Clergyable Offences, they ſhould be in as good a Situation as Men, who were convicted of the like.

My Lords, Taking theſe Two Statutes of the 20th of *Henry* the Sixth providing for the Trial and Judgment of Peereſſes, and the general Statute of the 3d and 4th of *William* the Third giving the Benefit of Clergy to Women, I ſhould think it impoſſible to ſay, that Peereſſes convicted of a Clergyable Offence were not to have preciſely the ſame Privileges as Peers convicted of ſuch Offences.

My Lords, If there be any Rule of Conſtruction in the Law, which is indiſputable, for expounding Statutes, it is this, that Statutes, as we ſay, *in pari materia*, relaing to one Subject, are to be conſidered as one Law, taken and interpreted together as throwing Light one upon the other: No Rule of Conſtruction is better eſtabliſhed. Follow that Rule of Conſtruction here: Take Firſt the general Law for the Trial of Peereſſes and the Judgment of Peereſſes in the ſame Manner as of Peers; then take the general Law, giving the Benefit of Clergy to Women in the ſame Manner as to Men; and who will not ſay, that that Rule of Conſtruction does not neceſſarily tend to put both, upon the Rank of Men and Women, in the ſame Condition, when convicted of the ſame Species of Offence? But what are the particular Acts of Parliament, which have been referred to as requiring a different Conſtruction? By the Firſt of *Edward* the Sixth, it is extremely clear, that Peers are not to undergo the ignominious Puniſhment of Burning. The Statute, that follows that of *Edward* the Sixth, is the 18th of *Elizabeth*, which takes away the Delivery to the Ordinary, ſubſtitutes Burning in its Place, and then gives a Power to impriſon. Whoever reads that Act, will ſee that it certainly was confined to Caſes, where Puniſhment was to be inflicted by Juſtices upon Perſons of an ordinary Deſcription, not Perſons of the Rank of Peers; and the Statute ſtrictly and clearly relates only to Perſons ſo having Clergy allowed, as is preſcribed by that Statute: And if the 18th of *Elizabeth* is to have the Conſtruction which is contended for, I underſtand it muſt have Effect alſo to inflict the Puniſhment of Burning upon Peers. So much, my Lords, for the Statute of the 18th of *Elizabeth*. The 21ſt of King *James* was mentioned as firſt in Part giving Clergy to Women: The 3d and 4th of King *William* the Third, is mentioned as alluding to it; it does ſo, but the Proviſions of the 3d and 4th of King *William* the Third are general, that is, a general Law extending the Benefit of Clergy to Women in all Caſes:

Now it is ſaid there, that they ſhall have the ſame Puniſhment as Men; they are to be in the like Situation as Men. Then the Act goes on to ſay, that is to ſay, Burning and Impriſoning.

My Lords, What is the fair Conſtruction of this Law? Why, that Women ſhall be in the ſame Situation as Men; and where Men are of ſuch Condition, that they would be burnt in the Hand, that they would be liable to be impriſoned, Women in like Manner ſhould be ſubject to Burning in the Hand, and ſhould be ſubject to Impriſonment: But no one ever heard, that the ſevere Part of a Law inflicting a Puniſhment ſhould be extended ſo by Conſtruction, where it was not ſo expreſs. Now you muſt act againſt the clear Proviſion of that Law, that Women ſhould be in the ſame Situation as Men, if you were to ſay, that a Peereſs convicted of a Clergyable Offence ſhould either undergo the Puniſhment of Burning, or the Puniſhment of Impriſonment. No one can ſay upon the Statute of *Edward* the Sixth, that they are ſubject to either. The Object of the Statute of *William* the Third was to make the Puniſhment of ſuch Offenders preciſely the ſame with regard to one Sex as the other; and the true Spirit and great Object of that Law muſt be directly acted againſt, if a Peereſs was to be put in a different Situation than a Peer, and to have a more ſevere and cruel Puniſhment inflicted upon her, than would be upon him. Theſe are the only general Obſervations, that occur to me now in taking the whole Scope of the Law: I therefore ſubmit to your Lordſhips, that the noble Lady at the Bar is intitled to the Benefit of theſe Statutes.

Mr. Attorney General.

My Lords, Concerning the Point which is now depending before the Houſe, I fairly confeſs, that, when your Lordſhips firſt called upon me to give my Reaſons why Judgment of Death ſhould not be ſuſpended upon the Prayer of the Priſoner, made in the Manner in which that Prayer was conceived; and upon the Effects and Conſequences of allowing her the Benefit of the Statute in a more regular Courſe; I would rather, if I might, have been excuſed from laying my Thoughts before your Lordſhips. I had heard a Rumour, that Men, whoſe Learning and Authority I greatly reverence, held a different Opinion. This would not fail to raiſe much Diſtruſt of my own Concluſions; although I had thoroughly conſidered the Subject; and although I never read any Propoſition, with more perfect Conviction of the Truth of it, ſince I learnt to read.

My Lords, That Idea, the only one I have been able to form, or adopt, is now very much ſtrengthened. That Cloud, which came over it from the rumoured Prevalence of contrary Notion, is very much removed. Becauſe, if there be no Opinion to the contrary, but what is to be founded on the Argument, I have heard to Day from thoſe who are beſt able to ſuſtain the contrary Opinion, I am perfectly ſatisfied, it is impoſſible this ſhould paſs as a Point of Law, or receive the Sanction of your Lordſhips Concurrence.

My Lords, What are the Arguments? Firſt, It is utterly inconceivable, that the Law ſhould put ſuch Difference between the Two Sexes. My Lords, if the Subject was laid by for a Moment, only to make a handſome Compliment to a very reſpectable Part of this Aſſembly, which well deſerves all the Attention it commands, it is impoſſible to quarrel with a Turn of Gallantry. But, reſuming the Subject, we are all agreed, that the Law did actually put that very Difference between the Sexes for many Centuries. And this uncourtly Statute of *Edward* the Sixth, proceeding upon the Law as it found it, did not think of aboliſhing the Diſtinction. It was quite beſide the Purpoſe of that Act, which did not mean to qualify the Severity of the Criminal Law in general, much leſs to make an equal Diſtribution of it among the Subjects at large. But, taking the Law as it ſtood, it was found inconvenient, incompatible, and ſhocking to Reaſon, that Lords of Parliament, who were to give their Voices upon the moſt arduous Affairs of a great Empire, ſhould do ſo under apparent Stigmata and Circumſtances of open Infamy. I don't rely on the Gender of the Words, but on the Purpoſe of the Act. Women are excluded by both. They were neither liable to the Stigmata, nor held the high Office which made them intolerable. Therefore Biſhops, whom the Twenty-eighth and Thirty-ſecond of *Henry* the Eighth had, at that Time, made liable to the whole Caſe of other Clerks convict, were included: Women certainly not. The Privilege was given, not to the Peerage, but to the Houſe of Parliament, to be claimed by the Members as ſuch. It was not ſubſtantive; but an Ingraftment on the Right to Clergy, which Women never had. In Truth, I have not heard a Hint from the Counſel on the other Side to queſtion the Exiſtence of this Difference down to the Third and Fourth of *William* and *Mary*; upon which Act they have chiefly

relied

relied in Argument. They lay it down, that Peers convict of Clergyable Crimes are exempt from all Puniſhment, not being within the Eighteenth of *Elizabeth*; that Peereſſes are to be tried and judged like Peers; that the Third and Fourth of *William* and *Mary* puts Women convict in the ſame Condition as Men; and that by ſome tacit Reference to the former Statutes, Peereſſes convict are not to be puniſhed at all.

I have troubled your Lordſhips already with my Reaſons for thinking, that, in old Time, Peers enjoyed the Benefit of Clergy in common with other Men, and upon the ſame Terms; that in the Fourth of *Henry* the Seventh, Burning was inflicted upon them as Lay Clerks; that the Statute of *Edward* the Sixth, in the very Moment of exempting them from the Penalties incurred at Law by Conviction, adjudges them Clerks, and delivers them for Purgation in the Biſhop's Court; that the Statute of *Elizabeth* delivers all, who ſhall thereafter be admitted to Clergy, from Purgation, and diſcharges them, ſubject to ſuch Correction by Impriſonment for leſs than a Year, as the Court ſhall think fit.

It is not denied, that theſe Words, in their plain and natural Senſe, embrace the Caſe of Peers. But, in this Context, it is ſuppoſed they do not, becauſe the Clerks convict are to be diſcharged after Allowance of their Clergy, and *after burning in the Hand according to the Statute*. This laſt Proviſion, they ſay, cannot refer to Peers. Nay, One learned Gentleman thought, that, if it ſhould be conſtrued to include Peers, they muſt, by Force of theſe Words, be burnt in the Hand.

I cannot follow this Idea. I have no Way of conceiving, how an Act which inflicts, or rather reſerves a Penalty, according to the Law as it then ſtood, can be interpreted to create a new Penalty; or, by what Chain of Reaſoning it is concluded, that where all Convicts are to be diſcharged upon the Allowance of Clergy, and ſuch Burning as the Law directs, thoſe are not to be diſcharged at all, for whom the Law has not directed Burning. Suppoſe the King ſhould pardon the Burning: It was thought, in Lord *Warwick*'s Caſe, that would be a perfect Diſcharge. Burning was not ſubſtituted in the Place of Purgation: That was a meer Slip: It is contrary to the Hiſtory: Burning exiſted before the Eighteenth of *Elizabeth*, in juſt the ſame Extent as after. Impriſonment, at the Diſcretion of the Temporal Judge, was the Subſtitute for Purgation; and is extended expreſsly to all, who are diſcharged from Purgation. But it ſeems too late to argue this. Was it not expreſsly decided in the Caſe of *Searl* and *Williams*, when Prohibition went to ſtay the Deprivation of a Parſon, who had been convicted of Manſlaughter, and diſcharged under the Eighteenth of *Elizabeth*, although he could not be burnt? "For when the Statute ſays after Burning, it "imports, where Burning ought to be; otherwiſe the Statute would do no good to Clerks, "for whom it was moſt intended." The Caſe is reported in *Hobart*. The Statute ſpeaks univerſally of every Body, thoſe who were, and thoſe who were not liable to Burning; and diſcharges them all, after Allowance of Clergy, and Burning according to Law, as it had ſtood before; that is, *reddendo ſingula ſingulis*.

The next Objection is, that the Word *Juſtices* will not apply to your Lordſhips, even while you are ſitting merely in the Characters of Judges. Therefore a Statute, which is to be executed by Juſtices, cannot relate to a Peer, who is not triable by Juſtices.

Is it then ſeriouſly contended, that your Lordſhips, exerciſing your Juriſdiction in the Trial of a Peer, will not do all the ſame Acts of Juſtice, which Judges muſt do in the Trial of a Commoner? Upon reading many Acts of Parliament, your Lordſhips will find, either, that you have no Juriſdiction at all, or that you muſt exerciſe it under the Character and Denomination of Juſtices. The ſame Objection might have been made to Lord *Ferrers*'s Execution; the ſame to the Burning a Peer under the Statute of *Henry* the Seventh. By the Word *Juſtices* I underſtand, in our Law, all Manner of Officers, who are intruſted with the Adminiſtration of Juſtice. So *Spelman* defines the Word. In high Antiquity, the Name went to the greateſt Subject in this Country; for I take the *Juſtitia totius Angliæ* to have been above the *Seneſchallus Regis*. Your Lordſhips therefore will not diſdain the Name; for you ſit here in no higher Character than that, which, by juſt and natural Conſtruction, is attributed to the Word *Juſtices*. Therefore, if no better Objections can be raiſed than theſe, I apprehend the Words of the Statute ſufficiently comprize the Peerage. This alſo was laid down in the Trial of Lord *Warwick*.

But, my Lords, if theſe are Objections, whither do they go? not only to ſubvert the Statute of *Elizabeth*, in this moſt reaſonable Particular of giving ſome *convenient* Correction, as the Statute calls it, to a Criminal found ſo upon Record; but to reſtore a Law, which has now for many Ages been underſtood to be at an End; and I flatter myſelf, conſidering the Account, which the Books all give of it, that Purgation is at an End.

But I am called upon to look at the 20th of *H.* VI. c. 9. This was a meer declaratory Law; reciting the 29th Chapter of *Magna Charta*, *Nullus Liber Homo*, and ſo forth, and a very

very abſurd Doubt, whether *Homo* included both Genders; and declaring, that "Ladies "ſhall be put to anſwer, and judged before ſuch Judges and Peers" (here by the way *Judges* and *Peers* are ſynonimous) "as Peers ſhould be." But though, by *Magna Charta*, Peereſſes were to be tried by their Peers, as other Women were by theirs, there the Privilege ends. All were, upon Conviction, to receive the like Judgment and Execution: And, in the Exemption from Death, the Difference was not between the Ranks, but the Sexes, of the Convicts. And ſo the Law undoubtedly continued, notwithſtanding this Statute.

But it was ſaid, that, by the Equity of this Statute, Marchioneſſes and Viſcounteſſes were included, though not named. This was to give Countenance to the Rule, that all Statutes *in pari materiâ* ſhall be conſtrued alike. There is great good Senſe in the Rule. Marchioneſſes and Viſcounteſſes were clearly within the Law declared; and conſequently within the Reaſon of declaring it: Therefore Ducheſſes, Counteſſes, and Baroneſſes were, by a Sort of Synechdoche, put for all Peereſſes. So where a Privilege is ſaved to certain Denominations of People, all others, who were before within the ſame Privilege, will be within the Saving, if there be nothing in the Context to raiſe a Diſtinction againſt them; particularly, if the Saving be only declaratory, and not a poſitive Exception. Nay, in a new Law, Things, equally within the Reaſon of it, have been comprized in it by Conſtruction. But this borders upon Arbitrary: Parliament ſeems the propereſt Judge of this Reaſon. If Peers, diſqualified to vote, ſhould claim the Benefit of the Firſt of *Edward* the Sixth, it might be argued with ſome Plauſibility, that they are within the Reaſon of the Act. They are ſo certainly, in every Point, except that of voting; and yet I ſhould think it too much to overlook ſo material a Diſtinction made by the Statute itſelf. But if Women, who were not concerned in any Part of the Subject Matter, make the ſame Claim, it would be making a perfectly new Law to include them. Where then is the *paritas materiæ* between the Act of *William* and *Mary*, for exempting Women from capital Puniſhment, and the Twentieth of *Henry* the Sixth, which had nothing to do with Puniſhment; or the Firſt of *Edward* the Sixth, which had nothing to do with Women?

I did propoſe Two Statutes to be conſidered *in pari materiâ*, the Acts of *James* and of *William* and *Mary*; the only Two, which confer upon any Woman any Exemption from Capital Puniſhment. I have not heard it denied, that if a Peereſs had ſtood convicted of the Crimes mentioned in the Firſt Act, the Puniſhment there ſpecified muſt have enſued. This fixes the Senſe of theſe Words *in the like Caſe*. I am poſſeſſed therefore of this Ground, that the Act of *Edward* the Sixth did not touch the Difference put by the Law of Clergy between the Sexes; nor that of *James* make any Difference as to the Quality of the Offender. We go intirely upon the Act of *William* and *Mary*. It is inaccurate to ſay, this Act puts Women into the ſame Condition with Men; and ſtill more, with Men of the ſame Quality reſpectively. There is nothing in it about the Condition of the Perſon. Where a Man, convict of any Felony, has Clergy, a Woman, *convict of the like Offence*, ſhall not have Judgment of Death, but ſuffer the ſame Puniſhment as a Man would ſuffer, with Clergy, *in the like Caſe*. Theſe Words refer altogether to the Quality of the Offence; that very Crime, which in one Record, applied to a Man, infers Judgment of Death, avoidable by his Claim of Clergy, applied in another to a Woman, infers the ſpecifick Judgment preſcribed by the Act. Nor are the Two Sexes put into the ſame Condition, even as to Puniſhment. All Women avoided Judgment of Death; not ſo of all Men. Some were indiſpenſably incapable of Holy Orders: Such cannot have their Clergy at this Day; nor had any other Exemption from Death before the Fifth of *Anne*. Some could not prove their Title to Clergy by Reading. Men could have their Clergy but once; Women the Benefit of this Statute *toties quoties*, till a ſubſequent Act altered the Law in this Reſpect.

Still leſs can the Words be twiſted to create a Difference as to Rank of the Offender. It is hard, ſays a learned Gentleman, to put the ſevereſt Conſtruction upon an Act of this Sort. The Act is not penal. But the ſhorter Anſwer is, there are not Two Conſtructions to chuſe between. If the Phraſe had been left general, *the ſame Puniſhment, as a Man ſhould ſuffer, that had his Clergy, in the like Caſe*, it might have been thought uncertain what that Puniſhment ſhould be; becauſe different Orders of Men were liable to different Meaſure of Puniſhment, *in the like Caſe*; the Bulk of Men to Forfeiture, Burning, and diſcretionary Impriſonment; inferior Eccleſiaſticks to Forfeiture and Impriſonment; Lords of Parliament to Impriſonment only. In ſuch a Text there might have been Room to contend for a favourable Conſtruction; and yet, even then, I ſhould have thought that the Meaſure of Puniſhment allotted to the Bulk of Mankind, undiſtinguiſhed by peculiar

Privileges, muſt have been deemed the Meaning of the Legiſlature. But whatever might have been the Conſtruction of ſuch a Text, it muſt have applied equally to all Women. They could not have been claſſed in Caſts, according to the Condition of their reſpective Huſbands; the Wife of a Lord of Parliament to be impriſoned; of an inferior Eccleſiaſtick to be impriſoned and to forfeit; of other Men to be impriſoned, to forfeit, and be burnt. The Statute however has put an End to all Queſtion, by ſtating expreſsly the very Meaſure of Puniſhment allotted to all Women.

Burnt in the Hand in open Court, it is ſaid, ſhall not apply to Peereſſes, becauſe they were never liable to be burnt at all. The Poſition is true, not of Peereſſes alone, but of all Women. But they were liable to Judgment of Death; for which this ſlighter Puniſhment was a deſirable Commutation.

My Lords, If there be any Thing in the Nature of the Puniſhment unreaſonable, or improper to be applied to Women in general, or to Noble-women in particular, let the Matter come before Parliament. It is a legiſlative Conſideration, and Parliament will entertain it according to the Extent of the Principle, which certainly will apply to many Noble-women of much higher Rank than ſome Peereſſes, who, as the Law now ſtands, are liable to that Puniſhment. So, I think, they ought to remain. Guilt levels Rank. A Noble-woman, covered with the Ignominy of ſuch a Conviction, cannot forfeit leſs than her Eſtimation.

My Lords, The only Queſtion is this; Has any poſitive Law granted the Exemption now demanded, to wind up ſuch a Record as this with perfect Impunity, a ridiculous Diſgrace to publick Juſtice? Has this been done in expreſs Terms; or in Terms, whoſe neceſſary Conſtruction amounts to expreſs?

My Lords, When I have qualified the Queſtion in that Manner, I have gone to the Verge of judicial Authority. And I do deſire to preſs this upon your Lordſhips as an univerſal Maxim; No more dangerous Idea can creep into the Mind of a Judge, than the Imagination, that he is wiſer than the Law. I confine this to no Judge, whatever be his Denomination, but extend it to all. And, ſpeaking at the Bar of an *Engliſh* Court of Juſtice, I make ſure of your Lordſhips Approbation, when I comprize even your Lordſhips, ſitting in *Weſtminſter Hall*. It is a grievous Example to other Judges. If your Lordſhips aſſume this, ſitting in Judgment, why not the King's Bench? Why not Commiſſioners of Oyer and Terminer? If they do ſo, why not the Quarter Seſſions? Ingenious Men may ſtrain the Law very far——but, to pervert it—to new-model it——the Genius of our Conſtitution ſays, Judges have no ſuch Authority, nor ſhall preſume to exerciſe it.

The Lords then adjourned to the Chamber of Parliament; and, after ſome Time paſſed there,

(See the Appendix.)

the Houſe adjourned again into *Weſtminſter-Hall*; when, after the uſual Proclamation for Silence, his Grace the Lord HighSteward, addreſſed the Ducheſs of *Kingſton* to the following Effect:

Lord High Steward. Madam, The Lords have conſidered of the Prayer you have made, to have the Benefit of the Statutes, and the Lords allow it you.

But, Madam, let me add, that although very little Puniſhment, or none, can now be inflicted, the Feelings of your own Conſcience will ſupply that Defect. And let me give you this Information likewiſe, that you can never have the like Benefit a Second Time, but another Offence of the ſame Kind will be Capital.

Madam, You are diſcharged, paying your Fees.

Lord High Steward. My Lords, This Trial being at an End, nothing remains to be done here, but to determine the Commiſſion.

Lords. Ay, ay.

Lord High Steward. Let Proclamation be made for diſſolving the Commiſſion of High Steward.

Serjeant at Arms. Oyez! oyez! oyez! Our Sovereign Lord the King does ſtrictly charge and command all Manner of Perſons here preſent, and that have here attended, to depart hence in the Peace of God, and of our ſaid Sovereign Lord the King, for his Grace my Lord High Steward of *Great Britain* intends now to diſſolve his Commiſſion.

Then the White Staff being delivered to the Lord High Steward by the Gentleman Uſher of the Black Rod on his Knee, his Grace ſtood up uncovered, and holding the Staff in both his Hands, broke it in two, and declared the Commiſſion to be diſſolved; and then, leaving

leaving the Chair, came down to the Woolpack, and ſaid, Is it your Lordſhips Pleaſure to adjourn to the Chamber of Parliament?

Lords. Ay, ay.

Lord High Steward. This Houſe is adjourned to the Chamber of Parliament.

Then the Peers, and others, returned back to the Chamber of Parliament in the ſame Order they came down, except that his Royal Highneſs the Duke of *Cumberland* walked after the Lord Chancellor.

APPENDIX.

Die Veneris, 19 *Aprilis* 1776.

ORDERED by the Lords Spiritual and Temporal in Parliament aſſembled, that the following Queſtions be put to the Judges, *viz.*

I. Whether a Sentence of the Spiritual Court againſt a Marriage in a Suit for Jactitation of Marriage is concluſive Evidence ſo as to ſtop the Counſel for the Crown from proving the ſaid Marriage in an Indictment for Polygamy?

II. Whether admitting ſuch Sentence to be concluſive upon ſuch Indictment, the Counſel for the Crown may be admitted to avoid the Effect of ſuch Sentence, by proving the ſame to have been obtained by Fraud or Colluſion?

Whereupon, *The Lord Chief Juſtice of the Court of Common Pleas*, having conferred with the Reſt of the Judges preſent, delivered their unanimous Opinion upon the ſaid Queſtions, with his Reaſons, as follow, *viz.*

My Lords,

My Lord Chief Baron, and the Reſt of my Brethren, have deſired me to deliver their Anſwer to the Queſtions your Lordſhips have been pleaſed to propound to us.

That our Opinion may be the better underſtood, it is neceſſary to make ſome Obſervations on what has paſſed in Argument upon the Subject.

What has been ſaid at the Bar is certainly true, as a general Principle, that a Tranſaction between Two Parties, in judicial Proceedings, ought not to be binding upon a Third; for it would be unjuſt to bind any Perſon who could not be admitted to make a Defence, or to examine Witneſſes, or to appeal from a Judgment he might think erroneous; and therefore the Depoſitions of Witneſſes in another Cauſe in Proof of a Fact, the Verdict of a Jury finding the Fact, and the Judgment of the Court upon Facts found, although Evidence againſt the Parties, and all claiming under them, are not, in general, to be uſed to the Prejudice of Strangers. There are ſome Exceptions to this general Rule, founded upon particular Reaſons, but not being applicable to the preſent Subject, it is unneceſſary to ſtate them.

From the Variety of Caſes relative to Judgments being given in Evidence in Civil Suits, theſe Two Deductions ſeem to follow as generally true. Firſt, that the Judgment of a Court of concurrent Juriſdiction, directly upon the Point, is as a Plea, a Bar, or as Evidence, concluſive, between the ſame Parties, upon the ſame Matter, directly in Queſtion in another Court. Secondly, that the Judgment of a Court of excluſive Juriſdiction, directly upon the Point, is, in like Manner, concluſive upon the ſame Matter, between the ſame Parties, coming incidentally in Queſtion in another Court, for a different Purpoſe. But neither the Judgment of a concurrent or excluſive Juriſdiction is Evidence, of any Matter which came collaterally in Queſtion, though within their Juriſdiction; nor of any Matter incidentally cognizable; nor of any Matter to be inferred by Argument from the Judgment.

Upon the Subject of Marriage, the Spiritual Court has the ſole and excluſive Cognizance of queſtioning and deciding, directly, the Legality of Marriage; and of inforcing, ſpecifically, the Rights and Obligations, reſpecting Perſons, depending upon it; but the Temporal Courts have the ſole Cognizance of examining and deciding upon all Temporal Rights of

Property; and, ſo far as ſuch Rights are concerned, they have the inherent Power of deciding incidentally, either upon the Fact, or the Legality of Marriage, where they lie in the Way to the Deciſion of the proper Objects of their Juriſdiction; they do not want or require the Aid of the Spiritual Courts; nor has the Law provided any legal Means of ſending to them for their Opinion; except where, in the Caſe of Marriage, an Iſſue is joined upon the Record in certain real Writs, upon the Legality of a Marriage, or its immediate Conſequence, "general Baſtardy;" or, in like Manner, in ſome other particular Inſtances, lying peculiarly in the Knowledge of their Courts, as Profeſſion, Deprivation, and ſome others; in theſe Caſes, upon the Iſſue ſo formed, the Mode of trying the Queſtion is by Reference to the Ordinary, and his Certificate, when returned, received, and entered upon the Record in the Temporal Courts, is a perpetual and concluſive Evidence againſt all the World, upon that Point; which exceptionable Extent, on whatever Reaſons founded, was the Occaſion of the Statute of the 9th of *Henry* VI. requiring certain public Proclamations to be made for Perſons intereſted to come in, and be Parties to the Proceeding. But, even in theſe Caſes, if the Ordinary ſhould return no Certificate, or an inſufficient one; or, if the Iſſue is accompanied with any ſpecial Circumſtances, as if a Second Iſſue, triable by a Jury, is formed upon the ſame Record; or, if the Effect of the ſame Iſſue is put into another Form, a Jury is to decide, and not the Ordinary to certify, the Truth; and to this Purpoſe Sir *William Staunford* mentions a remarkable Inſtance. Bigamy was triable by the Biſhop's Certificate; but if the Priſoner, to avoid the Charge, pleads that the Second Eſpouſals were null and void, becauſe he had a former Wife living, this ſpecial Bigamy was not to be tried by the Biſhop's Certificate.

So that the Trial of Marriage, either as to Legality, or Fact, was not abſolutely, and from its Nature, an Object *alieni fori*.

There was a Time, when the Spiritual Courts wiſhed that their Determinations might, in all Caſes, be received as authentic in the Temporal Courts; and in that ſolemn Aſſembly of the King, the Peers, the Biſhops, and Judges, convened for the Purpoſe of ſettling the Demands of the Church, by *Edward* the Second, One of the Claims was expreſſed in theſe Words: "*Si aliqua Cauſa, vel Negotium, cujus Cognitio ſpectat ad forum Eccleſiaſticum,* "*et coram eccleſiaſtico Judice fuerit ſententialiter Terminatum, et tranſierit in Rem judi-* "*catam, nec per Appellationem fuerit ſuſpenſum; et poſtmodum, coram Judice Seculari,* "*ſuper eadem Re, inter eaſdem Perſonas, Quæſtio moveatur, et provetur per Teſtes vel* "*Inſtrumenta, talis Exceptio in foro ſeculari non admittatur.*" The Anſwer to which Demand was expreſſed in this Manner: "*Quando eadem Cauſa, diverſis rationibus coram* "*Judicibus eccleſiaſticis, et Secularibus, ventilatur, dicunt, quod (non obſtante Eccleſiaſtico* "*Judicio) Curia Regis ipſum tractet Negotium, ut ſibi expedire videtur.*" For which Lord *Coke* gives this Reaſon, Second Inſtitute, C. 22. "For the Spiritual Judges Proceedings "are for the Correction of the Spiritual Inner Man, and *pro Salute Animæ*, to enjoin "him Penance; and the Judges of the Common Law proceed to give Damages and Re-"compence for the Wrong and Injury done," and then adds, "and ſo this Article was "deſervedly rejected."

And the ſame Demand was made, and received the ſame Anſwer, in the Third Year of King *James* the Firſt.

It is to be obſerved, that this Demand related only to Civil Suits between the ſame Parties; and that the Sentence ſhould be received as a Plea in Bar. But this Attempt and Miſcarriage did not prevent the Temporal Courts from ſhewing the ſame Reſpect to their Proceedings, as they did to thoſe in other Courts. And therefore where, in Civil Cauſes, they found the Queſtion of Marriage directly determined by the Eccleſiaſtical Courts, they received the Sentence, though not as a Plea, yet as Proof of the Fact; it being an Authority accredited in a judicial Proceeding by a Court of competent Juriſdiction; but ſtill they received it upon the ſame Principles, and ſubject to the ſame Rules, by which they admit the Acts of other Courts.

Hence a Sentence of Nullity, and a Sentence in Affirmance of a Marriage, have been received as concluſive Evidence on a Queſtion of Legitimacy ariſing incidentally upon a Claim to a real Eſtate.

A Sentence in a Cauſe of Jactitation has been received upon a Title in Ejectment, as Evidence againſt a Marriage, and, in like Manner in perſonal Actions, immediately founded on a ſuppoſed Marriage.

So a direct Sentence, in a Suit upon a Promiſe of Marriage, againſt the Contract, has been admitted as Evidence againſt ſuch Contract, in an Action brought upon the ſame Promiſe

miſe for Damages, it being a direct Sentence of a competent Court, diſproving the Ground of the Action.

So a Sentence of Nullity is equally Evidence in a perſonal Action againſt a Defence founded upon a ſuppoſed Coverture.

But in all theſe Caſes, the Parties to the Suits, or at leaſt the Parties againſt whom the Evidence was received, were Parties to the Sentence, and had acquieſced under it; or claimed under thoſe who were Parties, and had acquieſced.

But although the Law ſtands thus with regard to Civil Suits, Proceedings in Matters of Crime, and eſpecially of Felony, fall under a different Conſideration: Firſt, becauſe the Parties are not the ſame; for the King, in whom the Truſt of proſecuting public Offences is veſted, and which is executed by his immediate Orders, or in his Name by ſome Proſecutor, is no Party to ſuch Proceedings in the Eccleſiaſtical Court, and cannot be admitted to defend, examine Witneſſes, in any Manner intervene, or appeal. Secondly, ſuch Doctrines would tend to give the Spiritual Courts, which are not permitted to exerciſe any judicial Cognizance in Matters of Crime, an immediate Influence in Trials for Offences, and to draw the Deciſion from the Courſe of the Common Law, to which it ſolely and peculiarly belongs.

The Ground of the judicial Powers given to Eccleſiaſtical Courts is, merely, of a Spiritual Conſideration, *pro Correctione morum, et pro Salute Animæ.* They are therefore addreſſed to the Conſcience of the Party. But one great Object of Temporal Juriſdiction is the public Peace; and Crimes againſt the public Peace are wholly, and in all their Parts, of Temporal Cognizance alone. A Felony by Common Law was always ſo. A Felony by Statute becomes ſo at the Moment of its Inſtitution. The Temporal Courts alone can expound the Law, and judge of the Crime, and its Proofs; in doing ſo, they muſt ſee with their own Eyes, and try by their own Rules, that is, by the Common Law of the Land; it is the Truſt and ſworn Duty of their Office.

When the Acts of *Henry* the Eighth firſt declared what Marriages ſhould be lawful, and what inceſtuous, the Temporal Courts, though they had before no Juriſdiction, and the Acts did not by expreſs Words give them any upon the Point, decided, incidentally, upon the Conſtruction, declared what Marriages came within the *Levitical* Degrees, and prohibited the Spiritual Courts from giving or proceeding upon any other Conſtruction.

Whilſt an ancient Statute ſubſiſted (2 *H.* IV. 15.) by which perſonal Puniſhment was incurred on holding heretical Doctrines, the Temporal Courts took Notice, incidentally, whether the Tenet was heretical or not; for "the King's Courts will examine all Things ordained by Statute."

When the Statute of *W.* III. made certain blaſphemous Doctrines a Temporal Crime, the Temporal Courts alone could determine, whether the Doctrine complained of was blaſphemous ſo as to conſtitute the Crime.

If a Man ſhould be indicted for taking a Woman by Force and marrying her; or for marrying a Child without her Father's Conſent; or for a Rape, where the Defence is, that "the "Woman is his Wife;" in all theſe Caſes, the Temporal Courts are bound to try the Priſoner by the Rules and Courſe of the Common Law, and, incidentally, to determine what is heretical, and what is blaſphemous; and whether it was a Marriage within the Statute; a Marriage without Conſent; and whether, in the laſt Caſe, the Woman was his Wife: But if they ſhould happen to find, that Sentences, in the reſpective Caſes, had been given in the Spiritual Court upon the Hereſy, the blaſphemous Doctrines, the Marriage by Force, the Marriage without Conſent, and the Marriage on the Rape; and the Court muſt receive ſuch Sentences as concluſive Evidence, in the firſt Inſtance, without looking into the Caſe, it would veſt the ſubſtantial and effective Deciſion, though not the Cognizance, of the Crimes, in the Spiritual Court, and leave to the Jury, and the Temporal Courts, nothing but a nominal Form of Proceeding, upon what would amount to a predetermined Conviction or Acquittal; which muſt have the Effect of a real Prohibition, ſince it would be in vain to prefer an Indictment, where an Act of a foreign Court ſhall, at once, ſeal up the Lips of the Witneſſes, the Jury, and the Court, and put an intire Stop to the Proceeding.

And yet it is true, that the Spiritual Courts have no Juriſdiction, directly or indirectly, in any Matter not altogether Spiritual; and it is equally true, that the Temporal Courts have the ſole and intire Cognizance of Crimes, which are wholly and altogether Temporal in their Nature.

And if the Rule of Evidence muſt be, as it is often declared to be, reciprocal; and that, in all Caſes, in which Sentences, favourable to the Priſoner, are to be admitted as concluſive Evidence for him; the Sentences, if unfavourable to the Priſoner, are in like

Manner concluſive Evidence againſt him; in what Situation muſt the Priſoners be, whoſe Life, or Liberty, or Property, or Fame reſts on the Judgment of Courts, which have no Juriſdiction over them in the Predicament in which they ſtand? and in what Situation are the Judges of the Common Law, who muſt condemn, on the Word of an Eccleſiaſtical Judge, without exerciſing any Judgment of their own?

The Spiritual Court alone can deprive a Clergyman: Felony is a good Cauſe of Deprivation: Yet in Lord *Hobart*'s Reports it is held, that they cannot proceed to deprive for Felony, before the Felony has been tried at Law; and although, after Conviction, they may act upon That, and make the Conviction a Ground of Deprivation, neither Side can prove or diſprove any Thing againſt the Verdict; becauſe, as that very learned Judge declares, "it would be to determine, though not capitally, upon a Capital Crime, and thereby judge "of the Nature of the Crime and the Validity of the Proofs; neither of which belongs to "them to do."

If therefore ſuch a Sentence, even upon a Matter within their Juriſdiction, and before a Felony committed, ſhould be concluſive Evidence on a Trial for a Felony committed after, the Opinion of a Judge, incompetent to the Purpoſe, reſulting (for aught appears) from incompetent Proofs (as ſuppoſe the Suppletory Oath) will direct, or rule, a Jury and a Court of competent Juriſdiction, without confronting any Witneſſes, or hearing any Proofs: For the Queſtion ſuppoſes, and the Truth is, that the Temporal Court does not and cannot examine, whether the Sentence is a juſt Concluſion from the Caſe, either in Law or Fact; and the Difficulty will not be removed by preſuming, that every Court determines rightly, becauſe it muſt be preſumed too, that the Parties did Right in bringing the full and true Caſe before the Court; and if they did, ſtill the Court will have determined rightly by Eccleſiaſtical Laws and Rules, and not by thoſe Laws and Rules by which Criminals are to ſtand or fall in this Country.

If the Reaſon for receiving ſuch Sentence is, becauſe it is the Judgment of a Court competent to the Inquiry then before them; from the ſame Reaſon, the Determination of Two Juſtices of the Peace upon the Fact or Validity of a Marriage, in adjudging a Place of Settlement, may hereafter be offered as Evidence, and give the Law to the higheſt Court of Criminal Juriſdiction.

But if a direct Sentence upon the identical Queſtion, in a Matrimonial Cauſe, ſhould be admitted as Evidence (though ſuch Sentence againſt the Marriage has not the Force of a final Deciſion, that there was none) yet a Cauſe of Jactitation is of a different Nature; it is ranked as a Cauſe of Defamation only, and not as a Matrimonial Cauſe, unleſs where the Defendant pleads a Marriage; and whether it continues a Matrimonial Cauſe throughout, as ſome ſay, or ceaſes to be ſo on Failure of proving a Marriage, as others have ſaid, ſtill the Sentence has only a negative and qualified Effect, *viz.* "That the Party has failed in his "Proof, and that the Libellant is free from all Matrimonial Contract, *as far as yet appears*;" leaving it open to new Proofs of the ſame Marriage in the ſame Cauſe, or to any Proofs of That or any other Marriage in another Cauſe: And if ſuch Sentence is no Plea to a new Suit there, and does not conclude the Court which pronounces, it cannot conclude a Court, which receives the Sentence, from going into new Proofs to make out That or any other Marriage.

So that admitting the Sentence in its full Extent and Import, it only proves, that it did not yet appear that they were married, and not, that they were not married at all: And, by the Rule laid down by Lord Chief Juſtice *Holt*, ſuch Sentence can be no Proof of any Thng to be inferred by Argument from it; and therefore it is not to be inferred, that there was no Marriage at any Time or Place, becauſe the Court had not then ſufficient Evidence to prove a Marriage at a particular Time and Place. That Sentence, and this Judgment, may ſtand well together, and both Propoſitions be equally true; it may be true, that the Spiritual Court had not then ſufficient Proof of the Marriage ſpecified, and that your Lordſhips may now, unfortunately, find ſufficient Proof of ſome Marriage.

But if it was a direct and deciſive Sentence upon the Point, and, as it ſtands, to be admitted as concluſive Evidence upon the Court, and not to be impeached from within; yet, like all other Acts of the higheſt Judicial Authority, it is impeachable from without; although it is not permitted to ſhew that the Court was *miſtaken*, it may be ſhewn that they were *miſled*.

Fraud is an extrinſic collateral Act, which vitiates the moſt ſolemn Proceedings of Courts of Juſtice. Lord *Coke* ſays, it avoids all Judicial Acts, Eccleſiaſtical or Temporal.

In *Civil Suits* all Strangers may falſify, for Covin, either Fines, or real or feigned Recoveries; and even a Recovery by a juſt Title, if Colluſion was practiſed to prevent a fair Defence;

Defence; and this, whether the Covin is apparent upon the Record, as not eſſoining, or not demanding the View, or by ſuffering Judgment by Confeſſion or Default; or extrinſic, as not pleading a Releaſe, collateral Warranty, or other advantageous Pleas.

In *Criminal Proceedings* if an Offender is convicted of Felony on Confeſſion, or is outlawed, not only the Time of the Felony, but the Felony itſelf may be traverſed by a Purchaſer, whoſe Conveyance would be affected as it ſtands; and, even after a Conviction by Verdict, he may traverſe the Time.

In the Proceedings of the *Eccleſiaſtical* Court the ſame Rule holds. In *Dyer* there is an Inſtance of a Second Adminiſtration, fraudulently obtained, to defeat an Execution at Law againſt the Firſt; and the Fact being admitted by Demurrer, the Court pronounced againſt the fraudulent Adminiſtration. In another Inſtance an Adminiſtration had been fraudulently revoked; and the Fact being denied, Iſſue was joined upon it; and the Colluſion being found by a Jury, the Court gave Judgment againſt it.

In the more modern Caſes, the Queſtion ſeems to have been, Whether the *Parties* ſhould be permitted to prove Colluſion; and not ſeeming to doubt but that Strangers might.

So that Colluſion, being a Matter extrinſic of the Cauſe, may be imputed by a Stranger, and tried by a Jury, and determined by the Courts of Temporal Juriſdiction.

And if Fraud will vitiate the Judicial Acts of the Temporal Courts, there ſeems as much Reaſon to prevent the Miſchiefs ariſing from Colluſion in the Eccleſiaſtical Courts, which, from the Nature of their Proceedings, are at leaſt as much expoſed, and which We find have been, in Fact, as much expoſed, to be practiſed upon for ſiniſter Purpoſes, as the Courts in *Weſtminſter Hall*.

We are therefore unanimouſly of Opinion:

Firſt, That a Sentence in the Spiritual Court againſt a Marriage in a Suit of Jactitation of Marriage is not concluſive Evidence, ſo as to ſtop the Counſel for the Crown from proving the Marriage in an Indictment for Polygamy.

But Secondly, Admitting ſuch Sentence to be concluſive upon ſuch Indictment, the Counſel for the Crown may be admitted to avoid the Effect of ſuch Sentence, by proving the ſame to have been obtained by Fraud or Colluſion.

Die Sabbati, 20° *Aprilis* 1776.

ORDERED by the Lords Spiritual and Temporal in Parliament aſſembled, That the Lord Chief Juſtice of the Court of Common Pleas be, and he is hereby deſired to, favour this Houſe with a Copy of his Argument upon the Queſtions propoſed to the Judges by this Houſe Yeſterday.

Die Lunæ, 22° *Aprilis* 1776.

ORDERED by the Lords Spiritual and Temporal in Parliamet aſſembled, That the following Queſtion be put to the Judges, *viz.*

Whether a Peereſs convicted by her Peers of a Clergyable Felony is by Law intitled to the Benefit of the Statutes, ſo as to excuſe her from Capital Puniſhment, without being burnt in the Hand, or being liable to any Impriſonment?

Whereupon,

Whereupon, *the Lord Chief Baron of the Court of Exchequer*, having conferred with the reſt of the Judges preſent, delivered their unanimous Opinion upon the ſaid Queſtion, with his Reaſons, as follow, *viz.*

My Lords,

THE Queſtion propoſed by your Lordſhips for our Opinion is,

> Whether a Peereſs convicted by her Peers of a Clergyable Felony is by Law intitled to the Benefit of the Statutes, ſo as to excuſe her from Capital Puniſhment, without being burnt in the Hand, or being liable to any Impriſonment?

My Lords, Your Lordſhips would probably expect, that on a Queſtion of this Importance the Judges would have deſired Time to have conſidered of it; but, as it was eaſy to foreſee from the Firſt Appointment of this Trial, that a Queſtion of this Sort would probably ariſe, we have all looked into the ſeveral Statutes, from which any Light could be expected; and as on ſuch a Conſideration we have been able to form an Opinion, in which we all concur, we thought it our Duty to deliver it immediately, and not obſtruct the publick Buſineſs by unneceſſarily protracting this Trial, which has already taken up ſo much of your Lordſhips Time.

I am therefore authorized by my Brothers to ſay, we all concur in Opinion, that a Peereſs convicted by her Peers of a Clergyable Felony is by Law intitled to the Benefit of the Statutes, ſo as to excuſe her from Capital Puniſhment, without being burnt in the Hand, or being liable to any Impriſonment.

My Lords, The Queſtion depends on ſeveral Acts of Parliament; the Firſt I ſhall trouble your Lordſhips with, is the 29 *Hen.* VI. c. 9, which recites, "that by *Magna Charta* no "Freeman ſhall be taken, or impriſoned, or diſſeiſed of his Freehold, or his Liberties or free "Cuſtoms, or ſhall be outlawed, or in any wiſe deſtroyed, that is, forejudged of Life or "Limb, or put to Death, or ſhall be condemned at the King's Suit, either before the "King in his Bench, that is, the King's Bench, or before any other Commiſſioner or Judge "whatſoever, but by the lawful Judgment of his Peers, or by the Law of the Land; in "which Statute, that is, *Magna Charta*, no Mention is made how Women, Ladies of "great Eſtate in reſpect of their Huſbands Peers of the Land, married or ſole, that is to "ſay, Ducheſſes, Counteſſes, or Baroneſſes, ſhall be put to anſwer, or before what Judges "that they ſhall be judged upon Indictments of Treaſons or Felonies by them committed "or done; in regard whereof it is a Doubt in the Law of *England*, before whom and by "whom ſuch Ladies ſo indicted ſhall be put to anſwer and be judged: Our ſaid Lord "the King, willing to put out ſuch Ambiguities and Doubts, hath declared by Authority "aforeſaid, that ſuch Ladies ſo indicted, or hereafter to be indicted, of any Treaſon or "Felony by them done or hereafter to be done, whether they be married or ſole, that they "thereof ſhall be brought to anſwer, and put to anſwer and judged before ſuch Judges and "Peers of the Realm, as Peers of the Realm ſhould be if they were indicted or impeached "of ſuch Treaſons or Felonies done or hereafter to be done, and in like *(autiel)* Manner "and Form, and none otherwiſe."

Your Lordſhips will obſerve, that this Statute does not introduce a new Law, but is a declarative Law, explaining what the true Meaning of *Magna Charta* was. Peers in that Statute means Equals; and therefore any of the Nobility muſt by *Magna Charta* be tried by the Nobility who are their Peers; for all Nobility, whether Barons the loweſt, or Dukes the higheſt, Degree of Nobility, are all Equals in this Reſpect: And Lord *Coke*, 2 Inſt. 45, ſays, "Though Ducheſſes, Counteſſes, and Baroneſſes are only named in this declaratory "Statute, and Marchioneſſes and Viſcounteſſes are omitted, notwithſtanding, they are alſo "comprehended in this 29th Chapter of *Magna Charta*."

Peers, though originally meaning only Equals, is now by common Uſe applied to a particular Part of the Nation, diſtinguiſhed from the reſt by ſuperior Rank and Privileges, which they derive from the King originally by Writ or Letters Patents granted to them or their Anceſtors; and in Caſes of ſuch Ladies as are not ſo ennobled, they obtain that Nobility by Marriage to thoſe who are ſo ennobled.

As the next Statute, 1 *E.* VI. c. 12, ſ. 14, ſpeaks of the Benefit of Clergy, it will be neceſſary to ſay ſomething upon that Subject. Lord *Hale*, in his Second Volume of his Hiſtory

Hiſtory of Pleas of the Crown, Page 323, ſays, that "anciently Princes and States "converted to Chriſtianity granted the Clergy Exemptions of Places conſecrated to Religious "Duties from Arreſts for Crimes, which was the Original of Sanctuaries; and Second, "Exemptions of their Perſons from Criminal Proceedings in ſome Caſes capital before "ſecular Judges, which was the true Original of this *Privilegium Clericale*. The Clergy "increaſing in Wealth, Power, Honour, Number, and Intereſt claimed as a Right what "they at firſt obtained by the Favour of Princes and States, and by degrees extended "theſe Exemptions to all that had any Kind of ſubordinate Miniſtration relative to the "Church."

Theſe Exemptions never roſe to ſo great an Heighth in this Kingdom as in other Places; and therefore the Clergy were not exempted here from Civil Suits, nor was this *Privilegium Clericale* allowed in the loweſt Crimes not Capital, nor wherein they were not to loſe Life or Limb, nor in High Treaſon touching the King himſelf, or his Royal Majeſty: But by 25 *E.* III. c. 4, *de Clero*, in all other Felonies the Ordinary might demand the Priſoner as a Clerk, or the Priſoner himſelf might demand the Benefit of the Clergy. The Canon Law gave the Privilege only to Men in Holy Orders: Our Law, in Favour to Learning and the Deſire of the *Engliſh* Biſhops, extended to Lay Clerks, *i. e.* any Layman, that by reaſon of his Ability to read was in a Poſſibility of being made a Prieſt. C. J. *Treby*, State Trials, Vol. V. 171. The Means of trying, whether he was intitled to it, was by Reading: If he could read, he was delivered to the Ordinary, that is, the Biſhop, or the Perſon who had ordinary Juriſdiction there; but the Ordinary was ſo much the Miniſter of the Temporal Courts, and ſo ſubordinate to them, that if the Ordinary refuſed to let the Priſoner read, the Temporal Court could controul, and order a Book to be delivered to him; and if the Ordinary ſaid he could read when he could not, or *vice verſâ*, that he could not read when in Reality he could, the Temporal Courts gave Judgment according to the Truth of the Caſe; and thoſe Courts likewiſe directed, whether the Priſoner ſhould be delivered to the Ordinary with Purgation, or without Purgation: In the laſt Caſe they were to be kept in the Ordinary's Priſon for Life. If delivered with Purgation, then the Ordinary tried him for the Fact, whereof he was accuſed, by a Jury of Twelve Clerks; and if he was acquitted, as was generally the Caſe, he was diſcharged out of Priſon. Purgation was the Convict's clearing himſelf of the Crime by his own Oath, and the Oaths or Verdict of an Inqueſt of Twelve Clerks as Compurgators. The Proceeding was before the Ordinary; and old Books ſpeak of their making Proclamation for Perſons to come in againſt his Purgation, and of their enquiring into his Life, Converſation, and Fame, and of other Formalities; in all which, ſeveral Statutes ſay, there were great Abuſes.

The Statute 4 *H.* VII. c. 13, reciting that "upon Truſt of the Privilege of the Church "divers Perſons have been the more bold to commit Murder, Rape, Robbery, Theft, and "all other miſchievous Deeds, becauſe they have been continually admitted to the Benefit "of the Clergy, as oft as they offended:" It enacts, that "every Perſon not being "within Orders, which hath once been admitted to the Benefit of his Clergy, being again "arraigned of any ſuch Offence, be not admitted to have the Benefit or Privilege of the "Clergy; and that every Perſon ſo convicted for Murder (which was then a Clergyable "Offence) ſhould be marked with an M on the Brawn of the left Thumb; and if he be "for any other Felony, to be marked with a T in the ſame Place of the Thumb; and "thoſe Marks to be made by the Gaoler openly in the Court before the Judge, before that "ſuch Perſon be delivered to the Ordinary."

This Statute prevented Laymen having their Clergy more than once; and the Branding anſwered the Purpoſe of diſcovering, whether they had the Benefit of their Clergy before, though it was neceſſary to prove it by other Means, to prevent their having Clergy a Second Time.

The 1 *E.* VI. c. 12, will come next to be conſidered; which, after repealing ſeveral new-created Treaſons and Felonies, and taking away Clergy in ſeveral other Felonies, in Sec. 14, enacts, that "in all and every Caſe, where any of the King's Majeſty's Subjects "ſhall and may, upon his Prayer, have the Privilege of Clergy as a Clerk Convict that "may make Purgation; in all theſe Caſes and every of them, and alſo in all and every "Caſe and Caſes of Felony, wherein the Privilege and Benefit of Clergy is reſtrained, "excepted, or taken away by this Statute (wilful Murder and poiſoning of Malice prepenſed "only excepted) the Lord and Lords of the Parliament, and Peer and Peers of the Realm, "having Place and Voice in Parliament, ſhall by virtue of this preſent Act, of Common "Grace, upon his or their Requeſt or Prayer, alledging that he is a Lord or Peer of "this Realm, and claiming the Benefit of this Act, though he cannot read, without any

" Burning in the Hand, Loſs of Inheritance, or Corruption of his Blood, be adjudged, " deemed, taken, and uſed, for his Firſt Time only, to all Intents, Conſtructions, and " Purpoſes as a Clerk Convict, and ſhall be in Caſe of a Clerk Convict which may make " Purgation, without any further or other Benefit or Privilege of Clergy to any ſuch Lord " or Peer from thenceforth at any Time after for any Cauſe to be allowed, adjudged, or " admitted; any Law, Statute, Uſage, or Cuſtom, or any other Thing to the contrary " notwithſtanding: Provided always, that if any of the ſaid Lords of the Parliament, or " any of the Peers of this Realm for the Time being, ſhall fortune to be indicted of any " of the Offences limited in this Act, that then they and every of them ſhall have his or " their Trial by their Peers, as it hath been uſed heretofore in Caſes of Treaſon."

From the Time of this Statute, whenever a Peer has been convicted of any Felony, for which a Commoner might have the Benefit of Clergy, ſuch Peer, on praying the Benefit of this Statute, has always been diſcharged without burning or delivering to the Ordinary: And there are a Series of Precedents from Lord *Morley*'s Caſe, 1666, till one in this Reign as late as 1765; and C. J. *Treby* ſays, " the Statute 1 *E.* VI. exempts the Peers " convict of Clergyable Felonies from Burning in the Hand, and virtually repeals the Statute, " 4 *H.* VII. as to ſo much; and the Statute 18 *Eliz.* requires Burning in the Hand only " according to the Statute in that Behalf before provided: And there being no Statute " then or now in Force to ſubject Peers to ſuch Brand, they are in ſuch Caſe (upon the " allowing the Benefit of the ſaid Statute of *E.* VI. which is as much as Clergy without " Reading or Burning) freed from Diſcredit and other Penalties of the Felony, as much " as Commoners are by having Clergy formally allowed, and being burnt. State Trials, " Vol. V. 170." And he ſays, " a Peer ſhall have this Benefit without either Clergy or " Burning, a Clerk in Orders upon Clergy alone without Burning, and a Lay Clerk " not without Clergy and Burning. Ib. 172—3." And I believe no Body can diſpute but the Law is ſo. The Queſtion therefore is, Whether a Peereſs is not entitled to the ſame Privilege? and we are of Opinion that ſhe is.

Peers is a Word capable of including the whole Body of the Peerage, Females as well as Males; and every perſonal Privilege conferred on Peers is by Operation of Law communicated to Peereſſes, whether by Blood or Marriage, though only Males are mentioned. As Trial by Peers, though only recognized in *Magna Charta*, as belonging to the Male Sex, *nec ſuper eum ibimus, nec ſuper eum mittemus*, did by Conſtruction of Law belong to Females, as appears by 20 *H.* VI. which is only a declaratory Law: So any other perſonal Privilege, granted or confirmed to Peers generally, is communicated to Females, if it is of a Nature capable of being communicated to and enjoyed by them; as Trial by Peers, Freedom from Arreſt: Counteſs *Rutland*'s Caſe: *Moor* 769, and 2 *Co.* 52. And if thoſe Privileges are ſo communicated, as they certainly are, why ſhould not this given by 1 *E.* VI. the Conſequence of which is ſo reaſonable and agreeable to Juſtice, that a Female Offender ſhall not undergo a greater Puniſhment, than a Male of her own Rank would do for a Crime of the ſame Sort? But it was inſiſted at the Bar, that between 1 *E.* VI. and 18 *Eliz.* a Peer found guilty of a Clergyable Offence ſhould be delivered to the Ordinary as a Clerk Convict: And *Staunford*, 130, is quoted for that Purpoſe, that by the Words of this Statute a Peer ought to make his Purgation; and if ſo, he ought to be delivered to the Ordinary to be kept till he has made his Purgation. That Opinion of *Staunford* ſeems contrary to Law in many Particulars. The 1 *E.* VI. c. 3, had in Effect ſuſpended Purgation, even as to Commoners: Therefore the Legiſlature could never mean to introduce and eſtabliſh Purgation as to a Peer, which *Hobart* ſays, 289, " is no Ordinance of the Common " Law, but is a Practice among themſelves, *i. e.* the Clergy, rather overſeen and winked " at than approved by the Common Law:" And Page 291, he ſays, " the Perjuries " were ſundry in the Witneſſes and Compurgators, in the Jury of Clerks, and the Judge " himſelf was not clear, all turning the ſolemn Trial of Truth by Oath into a ceremonious " and formal Lie." It is not probable the Parliament, intending a great Diſtinction in Favour of Peers, ſo as to diſpenſe with Reading and Burning in the Hand, meant to leave a Peer a Priſoner in the Cuſtody of the Ordinary, and to have his Credit and Capacity to acquire perſonal Property, and enjoy the Profits of his Lands, to be decided upon in ſuch a mock Trial; and in Fact there is no Inſtance in any of the Law Books, where a Peer Convicted of a Clergyable Felony has ever been delivered to the Ordinary, or has made Purgation: And the Juriſdiction of the Ordinary to purge the Clerk only relates to Clerks in Orders, or ſuch as the Common Law conſidered as Clerks; and a Peer not being a Clerk he could not make Purgation; the Ordinary having no Juriſdiction over him; and the Words here, " have the Privilege of Clergy as a Clerk Convict that may make Purgation, and

" ſhall be adjudged, deemed, taken, and uſed for his Firſt Time only to all Intents, Con-
" ſtructions, and Purpoſes as a Clerk Convict, and ſhall be in Caſe of a Clerk Convict
" which may make Purgation," do not import or direct that he ſhall make Purgation; but give a Peer the ſame Advantage as a Clerk Convict who might make Purgation, *i. e.* an abſolute Diſcharge from all further Puniſhment; and the Statute, as to him, is to be conſtrued to be a Pardon: And it ſeems moſt probable, that Peers never did make Purgation; becauſe, as all who made Purgation were to be tried by a Jury of Clerks, ſuch Trial would be derogatory to their inherent Privilege of being tried by their Peers. Lord Chief Juſtice *Hale*, on this Statute (2 *H. H. P. C.* 376) ſays, I think, " it was never " meant that a Peer of the Realm ſhould be put to read, or be burnt in the Hand, where a " common Perſon ſhould be put to his Clergy;" neither is it ſaid, that he ſhall be diſcharged by his praying of the Benefit of this Statute, where a common Perſon ſhall have the Privilege of Clergy, and may make his Purgation; but only where he may have the Benefit of his Clergy in the Firſt Clauſe of the Statute: The other Clauſe (ſhall be in caſe of a Clerk Convict that may make Purgation) is only for his ſpeedier Diſcharge, and farther Advantage, and not to reſtrain the general Clauſe. But it is objected, that the Statute 1 *E.* VI. c. 12, gives this Privilege only to " Lord and Lords of the Parliament, and Peer and Peers of the " Realm having Place and Voice in the Parliament;" and that a Peereſs, not having Place and Voice in Parliament, cannot have the Benefit of this Statute: This Expreſſion, " having Place and Voice in Parliament," cannot mean to exclude all Peers but ſuch as ſat in Parliament; but to deſcribe ſome of the Incidents of Peerage, or to include Biſhops, who are Lords of Parliament though not Peers; and if theſe Words ſhould confine the Benefit of this Statute to thoſe only who actually ſat in Parliament, it would exclude Peers Minors, and Papiſt Peers, who, by Statute 30 *Car.* II. Stat. 2. c. 1, are now rendered incapable of ſitting or voting in Parliament: The Words therefore are merely deſcriptive, and not reſtrictive: And what makes it very plain is, that, in the 4th and 5th *P.* and *M.* c. 4, which takes away Clergy from Acceſſaries before the Fact in Murder and ſeveral other Offences, there is a Proviſo that every Lord and Lords of the Parliament and Peer and Peers of this Realm, having Place and Voice in Parliament, upon every Indictment for any of the Offences aforeſaid, ſhall be tried by their Peers, as hath been accuſtomed by the Laws of this Realm: Here are the very Words uſed in 1 *E.* VI. *c.* 12; yet it could never be doubted, but notwithſtanding thoſe Words, Peereſſes muſt be tried by their Peers for Offences againſt that Statute; and Lady *Somerſet* was tried by her Peers for being acceſſary to the Murder of Sir *Thomas Overbury*, which was an Offence againſt that very Statute: What gave Riſe probably to this Statute, 1 *E.* VI. c. 12, was another Statute paſſed the ſame Year, c. 3, providing for the Puniſhment of Vagabonds by making them Slaves for Two Years; in which Act was a Clauſe, that no Clerk Convict ſhall make his Purgation, but ſhall be a Slave for One Year to him, who will become bound with Two Sureties to the Ordinary to take him into his Service, and he ſhall be uſed like a Vagabond; and a Clerk attainted or Convict, which by Law cannot make his Purgation, may by the Ordinary be delivered to any Man, who will give Security to keep him as his Slave for Five Years; and it ſhall be lawful to every Perſon, to whom any ſhall be adjudged a Slave, to put a Ring of Iron about his Neck, Arm, or Leg. To avoid all poſſible Queſtion whether a Peer could be ſubject to any of theſe Proviſions, this Act 1 *E.* VI. c. 12, provides for their immediate Delivery, on praying the Benefit of this Statute: This Statute 1 *E.* VI, c. 3, was repealed 3d and 4th *E.* VI. c. 16, but was in Force when 1 *E.* VI. c. 12, was made. The next Statute, 18 *Eliz.* c. 7, provides, that every Perſon which ſhall be admitted and allowed to have the Benefit of Privilege of his Clergy, ſhall not thereupon be delivered to the Ordinary, as has been accuſtomed; but, after ſuch Clergy allowed and Burning in the Hand, according to the Statute in that Behalf provided, ſhall forthwith be enlarged and delivered out of Priſon by the Juſtices, before whom ſuch Clergy ſhall be granted, that Cauſe notwithſtanding: Then follows the Proviſo, that the Juſtices, before whom any ſuch Allowance of Clergy ſhall be had, ſhall and may, for the further Correction of ſuch Perſons to whom Clergy ſhall be allowed, detain and keep them in Priſon for ſuch convenient Time as the ſame Juſtices in their Diſcretions ſhall think convenient, ſo as the ſame do not exceed One Year's Impriſonment: This Proviſo plainly relates only to thoſe Perſons mentioned in the Clauſe, that is, *ſuch* Perſons as had been burnt in the Hand according to the Statute in that Caſe made and provided, meaning 4 *H.* VII. As Peers therefore are not to be burnt in the Hand, they cannot be impriſoned; for thoſe only are to be impriſoned who have been burnt in the Hand; and the Word, Juſtices, is more properly applicable to other Courts of Judicature than to this Houſe. The 21 *Ja.* I. c. 7, cannot relate to this Queſtion, for it relates to common Perſons,

ſons, and was intended to put Women on the ſame Footing with Men, as to ſmall Lar-
cenies; and 3d and 4th *W.* and *M.* c. does the ſame in all Clergyable Felonies: This
ſhews the Juſtice of allowing to the Peereſſes the ſame Benefit of 1 *E.* VI. c. 12, as Peers
have; and it is natural to ſuppoſe, that when the Legiſlature were putting Women of in-
ferior Rank on the ſame Footing as Men, they would have put Peereſſes on the ſame
Footing with Peers, had it not been conceived that the ſame Privileges were already ex-
tended to them.

Upon the Whole therefore, by Stat. 1 *E.* 6, a Peer convicted of a Clergyable Felony is
intitled to his immediate Diſcharge, without Reading or Burning in the Hand, or being liable
to Impriſonment by 18 *Eliz.*

This Privilege, given by Statute, being ſuch as may be enjoyed by a Peereſs, is by Ope-
ration of Law communicated to her, and puts her in the ſame Situation as a Peer; the Con-
ſequence of which is, that a Peereſs, convicted of a Clergyable Felony, praying the Benefit of
this Statute, is not only excuſed from capital Puniſhment, but ought to be immediately diſ-
charged, without being burnt in the Hand, or liable to any Impriſonment.

THE END